GS4.108:29/pt.500-899/982 mF

code of federal regulations

Labor

ORIGINAL

COMPLETED
856.

29

PARTS 500 TO 899
Revised as of July 1, 1982

022-003-94798-1

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

BEST DOCUMENT AVAILABLE

code of federal regulations

Labor

29

PARTS 500 TO 899

Revised as of July 1, 1982

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1982

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records Service
General Services Administration

as a Special Edition of
the Federal Register

I

BEST DOCUMENT AVAILABLE

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1982

FOR SALE BY THE SUPERINTENDENT OF DOCUMENTS
U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C. 20402

MICROFICHE (24X)

SUBSCRIPTION PRICE:	DOMESTIC--	$225.00 A YEAR
		$ 2.25 SINGLE COPY
	FOREIGN--	$280.00 A YEAR
		$ 2.85 SINGLE COPY

Table of Contents

Page

Explanation v

Title 29:

Subtitle B—Regulations Relating to Labor (continued):

Chapter V—Wage and Hour Division, Department of Labor 5

Finding Aids:

Material Approved for Incorporation by Reference 815

Table of CFR Titles and Chapters 817

Alphabetical List of Agencies Appearing in the CFR 831

Redesignation Tables 839

List of CFR Sections Affected 841

Cite this Code CFR

thus: 29 CFR 505.1

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, July 1, 1982), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to take steps to reduce the Federal paperwork burden for individuals, small businesses and State and local governments, as well as to maximize the usefulness of information collection. One specific requirement of the Act is for Federal agencies to display an OMB control number with the information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

INCORPORATION BY REFERENCE

What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR Part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR 51.4.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Service, Washington DC 20408, or call (202) 523-4534.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of Presidential documents appears at the end of each compilation of Title 3, The President.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

INQUIRIES AND SALES

For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402.

JOHN E. BYRNE,
Director,
Office of the Federal Register.

July 1, 1982.

BEST DOCUMENT AVAILABLE

New Publication

List of CFR Sections Affected

(1964 through 1972)

A Research Guide

These two volumes contain a compilation of the "List of CFR Sections Affected (LSA)" for the years 1964 through 1972. Reference to these tables will enable the user to find the precise text of CFR provisions which were in force and effect on any given date during the period covered.

Volume I (Titles 1 through 27) $15.00
Volume II (Titles 28 through 50) $14.00

ORDER FORM Mail to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

Enclosed is $ ________ ☐ check,
☐ money order, or charge to my
Deposit Account No.
☐☐☐☐☐☐☐–☐

Order No. ____________

VISA®

MasterCard

Credit Card Orders Only

Total charges $ ________ Fill in the boxes below

Credit Card No. ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiration Date Month/Year ☐☐☐☐

Please send me ___ copies of the CODE OF FEDERAL REGULATIONS
Volume I $15.00 Stock No. 022-003-94233-5
Volume II $14.00 Stock No. 022-003-94234-3

Name—First, Last
Street address
Company name or additional address line
City State ZIP Code
(or Country)

PLEASE PRINT OR TYPE

For Office Use Only

Quantity		Charges
______	Enclosed	
______	To be mailed	
______	Subscriptions	
Postage		
Foreign handling		
MMOB		
OPNR		
______	UPNS	
______	Discount	
______	Refund	

THIS TITLE

Title 29—Labor is composed of seven volumes. The parts in these volumes are arranged in the following order: Parts 0-99, Parts 100-499, Parts 500-899, Parts 900-1899, Parts 1900-1910, Parts 1911-1919, and Part 1920 to end. The contents of these volumes represent all current regulations codified under this title as of July 1, 1982.

Subject indexes appear following the occupational safety and health standards (Part 1910), and following the safety and health regulations for: Longshoring (Part 1918), Gear Certification (Part 1919), and Construction (Part 1926).

Redesignation tables appear in the Finding Aids section of certain volumes.

For this volume, Clarietha T. English was Chief Editor. The Code of Federal Regulations is published under the direction of Martha B. Girard, assisted by Robert E. Jordan.

Title 29—Labor

(This book contains Parts 500 to 899)

	Part
SUBTITLE B—REGULATIONS RELATING TO LABOR (Continued)	
CHAPTER V—Wage and Hour Division, Department of Labor	505

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR Chapter II.

Social Security Administration, Department of Health and Human Services: See Employees' Benefits, 20 CFR Chapter III.

NOTE: Other regulations issued by the Department of Labor appear in 20 CFR Chapters I, IV, V, VI, and VII; 29 CFR Subtitle A, Chapters II, IV, XVII, and XXV; 41 CFR Chapters 29, 50 and 60. For Standards for a Merit System of Personnel Administration: See 5 CFR Part 900.

BEST DOCUMENT AVAILABLE

BLANK PAGE

BLANK PAGE

Subtitle B—Regulations Relating to Labor—Continued

BLANK PAGE

BLANK PAGE

CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

(Parts 500 to 899)

SUBCHAPTER A—REGULATIONS

Part		Page
500-504	[Reserved]	
505	Labor standards on projects or productions assisted by grants from National Endowment for the Arts	10
511	Wage order procedure for Puerto Rico, the Virgin Islands, and American Samoa	13
515	Utilization of State agencies for investigations and inspections	20
516	Records to be kept by employers	23
519	Employment of full-time students at subminimum wages	38
520	Employment of student learners	50
521	Employment of apprentices	53
522	Employment of learners	57
523	Employment of messengers	75
524	Special minimum wages for handicapped workers in competitive employment	76
525	Employment of handicapped clients in sheltered workshops	80
526	Industries of a seasonal nature and industries with marked seasonal peaks of operation	88
527	Employment of student workers	102
528	Annulment or withdrawal of certificates for the employment of student learners, apprentices, learners, messengers, handicapped persons, student-workers, and full-time students in agriculture or in retail or service establishments at special minimum wage rates	104
529	Employment of patient workers in hospitals and institutions at subminimum wages	106

Part		*Page*
530	Employment of homeworkers in certain industries	113
531	Wage payments under the Fair Labor Standards Act of 1938	117
536	Area of production	131
541	Defining and delimiting the terms "Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman"	133
545	Homeworkers in industries in Puerto Rico	185
547	Requirements of a "Bona fide thrift or savings plan"	195
548	Authorization of established basic rates for computing overtime pay	196
549	Requirements of a "Bona fide profit-sharing plan or trust"	211
550	Defining and delimiting the term "Talent fees"	213
551	Local delivery drivers and helpers; wage payment plans	215
552	Application of the Fair Labor Standards Act to domestic service	219
553	Employees of public agencies engaged in fire protection or law enforcement activities (including security personnel in correctional institutions)	225
570	Child labor regulations, orders and statements of interpretation	235
575	Waiver of child labor provisions for agricultural employment of 10 and 11 year old minors in hand harvesting of short season crops	278
579	Child labor violations—civil money penalties	284
580	Civil penalties for child labor violations—rules of practice for administrative proceedings	290
601	Nonrubber footwear industry in Puerto Rico	296
602	Leather, leather goods, and related products industry in Puerto Rico	296
603	Gloves and mittens industry in Puerto Rico	298
604	Metal, machinery, transportation equipment, and allied products industry in Puerto Rico	299
606	Electrical, instrument, and related products industry in Puerto Rico	300
608	Handkerchief, scarf, and art linen industry in Puerto Rico	301
609	Women's and children's underwear and women's blouse industry in Puerto Rico	302

Chapter V—Wage and Hour Division

Part		*Page*
610	Children's dress and related products industry in Puerto Rico	302
611	Sweater and knit swimwear industry in Puerto Rico	303
612	Women's outerwear, needlework, and miscellaneous fabricated textile products industry in Puerto Rico	304
613	Jewelry and miscellaneous products manufacturing industry in Puerto Rico	305
614	Corsets, brassieres, and allied garments industry in Puerto Rico	307
615	Men's and boys' clothing and related products industry in Puerto Rico	308
617	Military hats and caps industry in Puerto Rico	309
619	Alcoholic beverage and industrial alcohol industry in Puerto Rico	310
657	Tobacco manufacturers industry in Puerto Rico	310
661	Banking, insurance and finance industry in Puerto Rico	312
670	The chemical, petroleum, and related products industry in Puerto Rico	313
671	Communications, utilities, and transportation industry in Puerto Rico	314
672	Business, professional and miscellaneous services industry in Puerto Rico	315
673	The food and kindred products industry	316
675	Furniture and fixtures and lumber and wood products industry in Puerto Rico	319
677	Paper, paper products, printing, and publishing industry in Puerto Rico	320
678	Stone, clay and glass products and nonmetallic mining industry in Puerto Rico	321
683	Wholesaling and warehousing industry in Puerto Rico	323
687	Hosiery industry in Puerto Rico	323
689	Sugar manufacturing industry in Puerto Rico	325
690	Fabricated plastic products industry in Puerto Rico	325
694	Minimum wage rates in industries in the Virgin Islands	327
695	Homeworkers in industries in the Virgin Islands	331
697	Industries in American Samoa	333
699	Textile and textile products industry in Puerto Rico	336
700	Government workers industry in Puerto Rico	338
701	Newly covered employment in Puerto Rico other than government service	339

Part		Page
720	Rubber and miscellaneous plastics products industry in Puerto Rico	341
721	Retail trade industry in Puerto Rico	342
723	Laundry and cleaning industry in Puerto Rico	344
724	Hospital and related institutions industry in Puerto Rico	344
725	Education industry in Puerto Rico	345
726	Construction industry in Puerto Rico	346
727	Agriculture industry in Puerto Rico	346
728	Hotel and motel industry in Puerto Rico	349
729	Restaurant and food service industry in Puerto Rico	349
730	Rubber and plastics footwear industry in Puerto Rico	350

SUBCHAPTER B—STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

Part		Page
775	General	352
776	Interpretative bulletin on the general coverage of the wage and hours provisions of the Fair Labor Standards Act of 1938	354
778	Overtime compensation	393
779	The Fair Labor Standards Act as applied to retailers of goods or services	451
780	Exemptions applicable to agriculture, processing of agricultural commodities, and related subjects under the Fair Labor Standards Act	555
782	Exemption from maximum hours provisions for certain employees of motor carriers	630
783	Application of the Fair Labor Standards Act to employees employed as seamen	646
784	Provisions of the Fair Labor Standards Act applicable to fishing and operations on aquatic products	662
785	Hours worked	689
786	Miscellaneous exemptions	701
788	Forestry or logging operations in which not more than eight employees are employed	702
789	General statement on the provisions of section 12(a) and section 15(a)(1) of the Fair Labor Standards Act of 1938, relating to written assurances	707
790	General statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938	711

Part *Page*
791 Joint employment relationship under Fair Labor Standards Act of 1938 737
793 Exemption of certain radio and television station employees from overtime pay requirements under section 13(b)(9) of the Fair Labor Standards Act 738
794 Partial overtime exemption for employees of wholesale or bulk petroleum distributors under section 7(b)(3) of the Fair Labor Standards Act .. 744
800 Equal pay for equal work under the Fair Labor Standards Act 763

SUBCHAPTER C—AGE DISCRIMINATION IN EMPLOYMENT

860 Interpretations 792

SUBCHAPTER D—GARNISHMENT OF EARNINGS

870 Restriction on garnishment 807
871-899 [Reserved]

Cross References: For appointment of authorized representatives to grant or deny applications for, and to cancel special certificates for employment of apprentices and learners: See 12 FR 6837, Oct. 18, 1947.

For appointment of Director and Assistant Director of Field Operations Branch as authorized representatives to grant, deny or cancel special homework certificates, and certificates for employment of handicapped workers or of handicapped clients in sheltered workshops in place of authorized representatives previously designated. See 12 FR 7145, Nov. 4, 1947.

BEST DOCUMENT AVAILABLE

SUBCHAPTER A—REGULATIONS

PARTS 500–504 [RESERVED]

PART 505—LABOR STANDARDS ON PROJECTS OR PRODUCTIONS ASSISTED BY GRANTS FROM NATIONAL ENDOWMENT FOR THE ARTS

Sec.
505.1 Purpose and scope.
505.2 Definitions.
505.3 Prevailing minimum compensation.
505.4 Receipt of grant funds.
505.5 Adequate assurances.
505.6 Safety and health standards.
505.7 Failure to comply.

AUTHORITY: Sec. 5(j), 79 Stat. 848; 20 U.S.C. 954(j), and Secretary's Order 1-66 (31 FR 1274) and Secretary's Order 12-66 (31 FR 12620).

SOURCE: 32 FR 4309, Mar. 21, 1967, unless otherwise noted.

§ 505.1 Purpose and scope.

(a) The regulations contained in this part set forth the procedures which are deemed necessary and appropriate to carry out the provisions of section 5(j) of the National Foundation on the Arts and Humanities Act of 1965, 79 Stat. 848; 20 U.S.C. 954(j); relating to labor standards requirements on projects or productions assisted by grants from the National Endowment for the Arts.

(b) Regulations and procedures relating to wages on construction projects as provided in section 5(k) of the National Foundation on the Arts and Humanities Act of 1965 may be found in Parts 3 and 5 of this title.

(c) Standards of overtime compensation for laborers or mechanics may be found in the Contract Work Hours and Safety Standards Act, 76 Stat. 357, 40 U.S.C. 327 note.

[32 FR 4309, Mar. 21, 1967, as amended at 37 FR 14301, July 19, 1972]

§ 505.2 Definitions.

(a) The term "Act", means the National Foundation on the Arts and the Humanities Act of 1965, 79 Stat. 848, 20 U.S.C. 954(j).

(b) The term "Secretary" means the Secretary of Labor.

(c) The term "Administrator" means the Administrator of the Wage and Hour Division/Deputy Assistant Secretary for Employment Standards, who exercises responsibilities for the Secretary over the requirements pertaining to wages.

(d) The term "Assistant Secretary" means the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, who exercises responsibilities for the Secretary over the requirements pertaining to safety and health.

(e) "Professional" in the phrase "professional performer and related or supporting professional personnel" shall include all those who work for compensation on a project or production which is assisted by a grant from the National Endowment for the Arts regardless of whether paid out of grant funds. It shall not include those whose status is "amateur" because their engagement for performance or supporting work contemplates no compensation. The words "related or supporting . . . personnel" in the same phrase shall include all those whose work is related to the particular project or production such as musicians, stage hands, scenery designers, technicians, electricians and moving picture machine operators, as distinguished from those who operate a place for receiving an audience without reference to the particular project or production being exhibited, such as ushers, janitors, and those who sell and collect tickets. The phrase shall not include laborers and mechanics employed by contractors or subcontractors on construction projects, but their compensation is regulated under section 5(k) of the Act. The phrase "professional performers and related or supporting professional personnel" shall not include persons employed as regular faculty or staff of an educational institution performing primary duties commonly associated with the teaching process. It shall include persons employed by educational institutions primarily to engage in activities customarily performed by the performing artists or by

BEST DOCUMENT AVAILABLE

those who assist in the presentation of the performing arts.

[32 FR 4309, Mar. 21, 1967, as amended at 37 FR 14301, July 19, 1972]

§ 505.3 Prevailing minimum compensation.

(a) *Generally.* Investigation has revealed that nearly all of the persons employed in activities similar to those which will be performed by professional performers and related or supporting professional personnel do so pursuant to contracts between their employers and the following national or international labor organizations or local labor organizations which are affiliated with one of them:

Actors' Equity Association.
Screen Actors Guild, Inc.
Screen Extras Guild, Inc.
American Guild of Musical Artists, Inc.
International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators.
American Federation of Musicians.
National Association of Broadcast Employees and Technicians.
American Federation of Television and Radio Artists.
International Brotherhood of Electrical Workers.
American Guild of Variety Artists.

These contracts provide the minimum compensation (including fringe benefits) to be paid such professional performers and related or supporting professional personnel. The compensation provided in each of these contracts is hereby determined to be the prevailing minimum compensation for each of the professional performers and related or supporting professional personnel to which it applies or would apply if he were a member of the appropriate one of the above-mentioned labor organizations. Such determination shall be subject to variation, however, on behalf of any adversely affected professional worker or grantee as provided in paragraph (b) of this section.

(b) *Variations*—(1) *On behalf of professional workers.* Any professional performer or related or supporting professional personnel desiring employment on any such project or production and any labor organization representing any one of them may protest the determination made in paragraph (a) of this section. Such protest shall be in writing, shall be directed to the Administrator, shall identify the locality or localities and the class or classes of professional performers and related or supporting professional personnel to whom it relates, shall specify the minimum compensation which actually prevails in each such locality for each such class and shall present all of the evidence available touching on the issue. The Administrator will make a determination concerning each such protest to the extent necessary to resolve the issue for any approved grant application.

(2) *On behalf of grantees.* Any grant applicant who proposes to compensate any professional performer or related or supporting professional personnel in an amount less than the prevailing minimum compensation determined in paragraph (a) of this section shall specify the lower minimum compensation he proposes to pay and present such evidence as he may have that the prevailing minimum compensation is not more than he proposes to pay. If such grant application is otherwise approved, such issue will be resolved by the Administrator.

§ 505.4 Receipt of grant funds.

(a) The grantee shall not receive funds authorized by section 5 of the Act until adequate initial assurances pursuant to section 5(j) (1) and (2) of the Act as provided in §§ 505.5(a) and 505.6 have been filed with the Chairman of the National Endowment of the Arts. Neither shall he receive any such funds if and after the Chairman of the National Endowment of the Arts is advised by the Secretary that continuing assurances as provided in § 505.5(b) are inadequate or that labor standards contemplated by section 5(j) (1) and (2) of the Act have not been observed.

(b) In order to facilitate such assurance so that the grantee may receive the grant funds promptly, the Chairman of the National Endowment of the Arts will transmit to each grantee of a grant under section 5 of the National Foundation on the Arts and Humanities Act of 1965 with the grant letter a copy of these regulations together with two copies of USDL Form No. 1-297. He will advise the grantee that before the grant may be received, the grantee must give assurances that all professional performers and related or supporting professional personnel (other than laborers or mechanics with respect to whom labor standards are prescribed in subsection 5(k) of the Act), will be paid, without subsequent deduction or rebate on any account not less than the minimum compensation determined in § 505.3(a) unless a variation is obtained under § 505.3(b) and that the safety and health requirements under § 505.6 are met. The Chairman will maintain on file in Washington, D.C., for a period of six (6) years and make available upon request to the Secretary the original signed Form USDL No. 1-297 and a copy of the grant letter together with any supplementary documents needed to give a description of the project or production to be financed in whole or part under the grant.

[32 FR 4309, Mar. 21, 1967, as amended at 37 FR 14301, July 19, 1972]

§ 505.5 Adequate assurances.

(a) *Initial assurances.* Unless the grantee seeks variation of the determination of prevailing minimum compensation contained in § 505.3, or variation of the safety and health standards contained in § 505.6, execution of USDL Form No. 1-297 will constitute his initial assurances. If variation of the prevailing minimum compensation provided in § 505.3(a) is sought under § 505.3(b) the information called for by § 505.3(b) shall be furnished in lieu of assurances on USDL Form No. 1-297 and appropriate assurances will be drafted by the Administrator for the grantee upon resolution of the application for variation.

(b) *Continuing assurances.* (1) The grantee shall maintain and preserve sufficient records as an assurance of compliance with section 5(j) (1) and (2) of the Act and shall make such reports therefrom to the Secretary as necessary or appropriate to assure the adequacy of the assurances given. These records shall include the following information relating to each performer and related or supporting personnel for whom a prevailing minimum compensation determination has been made pursuant to § 505.3. In addition the record required in paragraph (b)(1)(vii) of this section shall be kept for all employees engaged in the project or production assisted by the grant.

(i) Name.

(ii) Home address.

(iii) Occupation.

(iv) Basic unit of compensation (such as the amount of a weekly or monthly salary, talent or performance fee, hourly rate or other basis on which compensation is computed), including fringe benefits or amounts paid in lieu thereof.

(v) Work performed for each pay period expressed in terms of the total units of compensation fully and partially completed.

(vi) Total compensation paid each pay period, deductions made, and date of payment, including amounts paid for fringe benefits and the person to whom they were paid, and

(vii) Brief description of any injury incurred while performing under the grant and the dates and duration of disability.

Such records shall be kept for a period of 2 years after completion of the project or production to which they pertain.

(2) The grantee shall permit the Administrator and the Assistant Secretary or their representatives to investigate and gather data regarding the wages, hours, safety, health, and other conditions and practices of employment related to the project or production, and to enter and inspect such project or production and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether the grantee has violated the labor standards contemplated by section 5(j) of the Act, or which may aid in the enforcement of such standards.

(c) *Determination of adequacy.* The Administrator and Assistant Secretary shall determine the adequacy of assurances within each of their respective areas of responsibilities, given pursuant to paragraphs (a) and (b) of this section and may revise their determination at any time.

[32 FR 4309, Mar. 21, 1967, as amended at 37 FR 14301, July 19, 1972]

§ 505.6 Safety and health standards.

(a) *Standards.* Section 5(j) (2) of the Act provides that "(2) no part of any project or production which is financed in whole or in part under this section will be performed or engaged in under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees engaged in such project or production. Compliance with the safety and sanitary laws of the State in which the performance or part thereof is to take place shall be prima facie evidence of compliance. The Secretary of Labor shall have the authority to prescribe standards . . . as he may deem necessary or appropriate to carry out" this provision. The applicable safety and health standards shall be those published in 41 CFR Part 50-204, including matters incorporated by reference therein. Evidence of compliance with State laws relating to health and sanitation will be considered prime facie evidence of compliance with the safety and health requirements of the Act and any contract subject thereto, and it shall be sufficient unless rebutted or overcome by a preponderance of evidence of a failure to comply with any applicable safety and health standards published in 41 CFR Part 50-204, including matters incorporated by reference therein.

(b) *Variances.* (1) Variances from standards applied under paragraph (a) of this section may be granted under the same circumstances in which variances may be granted under section 6(b)(6)(A) or 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 655). The procedures for the granting of variances and for related relief are those published in Part 1905 of this title.

(2) Any requests for variances shall also be considered requests for variances under the Williams-Steiger Occupational Safety and Health Act of 1970, and any variance from a standard applied under paragraph (a) of this section and in Part 1910 of this title shall be deemed a variance from the standards under both the National Foundation on the Arts and Humanities Act of 1965 and the Williams-Steiger Occupational Safety and Health Act of 1970.

[36 FR 9865, May 29, 1971]

§ 505.7 Failure to comply.

The Secretary's representatives shall maintain a list of those grantees who are considered to be responsible for instances of failure to comply with the obligation of the grantees specified in section 5(j) (1) and (2) of the Act, which are considered to have been willful or of such nature as to cast doubt on the reliability of formal assurances subsequently given and there shall be maintained a similar list where adjustment of the violations satisfactory to the Secretary was not properly made. Assurances from persons or organizations on either such list or any organization in which they have a substantial interest shall be considered inadequate until such time as they may, by appropriate application to the Secretary, achieve their removal from such lists.

PART 511—WAGE ORDER PROCEDURE FOR PUERTO RICO, THE VIRGIN ISLANDS, AND AMERICAN SAMOA

Sec.

511.1 General method for issuance of wage orders.
511.2 Initiation of proceedings; notices of hearings.
511.3 Composition and appointment of committees.
511.4 Compensation of committee members.
511.5 Vacancies and dissolution of committees.
511.6 Investigation.
511.7 Committee staff.
511.8 Prehearing statements.
511.9 Requirements for quorum and decisions.
511.10 Subjects and issues.
511.11 Pertinent data.
511.12 Committee and subcommittee meetings.
511.13 Evidence.
511.14 Procedure for receiving evidence.
511.15 Submittals prior to reports.
511.16 Reports.

BEST DOCUMENT AVAILABLE

Sec.
511.17 Records.
511.18 Publication and effective date of wage order.
511.19 Petitions.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208; secs. 2-12, 60 Stat. 237-244; 5 U.S.C. 1001-1011.

SOURCE: 21 FR 7669, Oct. 6, 1956, unless otherwise noted.

§ 511.1 General method for issuance of wage orders.

Pursuant to authority delegated by the Secretary of Labor, the Administrator of the Wage and Hour Division publishes the orders which are required by statute to make the recommendations of industry committees effective as wage orders under section 6(c) of the Fair Labor Standards Act. The wage orders issued by the Administrator must by law give effect to the recommendations of the industry committees. All wage order proceedings will be conducted in accordance with the standards provided in the Administrative Procedure Act as interpreted and applied in this part.

§ 511.2 Initiation of proceedings; notices of hearings.

(a) Wage order proceedings are initiated by order of the Secretary, published in the FEDERAL REGISTER, giving notice of hearings by industry committees to recommend the minimum rate or rates of wages to be paid under section 6 of the act to employees in Puerto Rico, the Virgin Islands, and American Samoa engaged in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce. These orders will contain a definition of the particular industry in Puerto Rico, the Virgin Islands, or American Samoa, for which the committee is to make its recommendations, or these orders will direct the committee to recommend the minimum rate or rates of wages for all industry in Puerto Rico, the Virgin Islands, or American Samoa. All such orders will make provision for convening the committee. Any particular industry defined in such an order may be a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(b) These orders will also give reasonable notice (1) of the time and place of the commencement of the hearing of such witnesses and receiving of such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under the act, (2) of the general nature of the wage order proceedings and the authority under which they are proposed, (3) of the subjects and issues involved, and (4) that the committee will take official notice of the economic report (note § 511.13) and the parties will have an opportunity at the hearing to show any contrary or additional facts.

[26 FR 6513, July 20, 1961]

§ 511.3 Composition and appointment of committees.

An industry committee will be composed of residents of the island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico, the Virgin Islands, and American Samoa. The Secretary will appoint as members of each committee an equal number of persons representing (a) the public, (b) employees in the industry, and (c) employers in the industry. The public members shall be disinterested, and the Secretary will designate one as chairman. For purposes of this section only, the definition of the industry shall be considered to include all such industry throughout the United States, its territories and possessions.

[27 FR 10651, Nov. 1, 1962]

§ 511.4 Compensation of committee members.

Each member of an industry committee will be allowed a per diem of $153 for each day actually spent in the work of committee, and will, in addition, be reimbursed for necessary transportation and other expense incident to traveling in accordance with Standard Government Travel Regulations then in effect. All travel expenses will be paid on travel vouchers

BEST DOCUMENT AVAILABLE

certified by the Administrator or his authorized representative. Any other necessary expenses which are incidental to the work of the committee may be incurred by the committee upon approval of, and shall be paid upon certification of the Administrator or his authorized representative.

[47 FR 11866, Mar. 19, 1982]

§ 511.5 Vacancies and dissolution of committees.

The Secretary will appoint persons to fill any vacancies occurring in industry committees. If an industry committee is unable to arrive at a recommendation within a reasonable time, or refuses to make a recommendation, it may be dissolved by the Secretary. An industry committee shall cease to perform further functions when it has filed with the Administrator its report containing its findings of fact and recommendations with respect to the matters referred to it, and shall not again perform any functions with respect to any matter reported on, unless and until directed by the Administrator. An industry committee shall be dissolved automatically when its recommendations are no longer subject to review under section 10 of the Act.

[27 FR 10651, Nov. 1, 1962]

§ 511.6 Investigation.

The Administrator shall prepare an economic report containing such data as he is able to assemble pertinent to the matters to be referred to a committee. A copy of these regulations will be sent to each member of the committee following his appointment, and a copy of the economic report when completed will be furnished promptly. Before making its report the committee will decide whether it will conduct any further investigation, apart from the hearing and the review of the economic report, in connection with the matters referred to it.

§ 511.7 Committee staff.

Each industry committee will be furnished a lawyer, to serve as committee counsel, and an economist, to serve as committee economist. Committee counsel shall advise the committee on the issues of law, including interpretations of these regulations and the legal scope of the committee's discretion, which arise during the committee proceedings. The committee counsel and economist shall be available to advise and assist the committee at all of its meetings. The Administrator shall furnish the committee with adequate stenographic, clerical, and other assistance.

§ 511.8 Prehearing statements.

(a) Every employer, employee, trade association, trade union, or group of employers, employees, associations, or unions in the industry as defined, or in such industry elsewhere in the United States, and every other person who, in the judgment of the committee has an interest sufficient to justify the participation he proposes, shall be considered an interested person. No member of the committee may participate as an interested person.

(b) Any interested person who wishes to participate on his own behalf or by counsel shall file a written prehearing statement not later than ten days before the first hearing date set for any committee in a notice of hearing concerning minimum wages for Puerto Rico or the Virgin Islands, or such other period of time as may be prescribed in a notice of hearing, or other notice published in the FEDERAL REGISTER, the original and 11 copies of the prehearing statement shall be filed at the Office of the Director of the Caribbean Office of the Wage and Hour Division, United States Department of Labor, New Federal Office Building, Room 403, Carlos Chardon Street, Hato Rey, Puerto Rico 00918, and one copy at the Office of the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210. If such statements are sent by airmail from Puerto Rico or the Virgin Islands to the mainland or from the mainland to Puerto Rico, or from the mainland to Washington, such filing shall be deemed timely if postmarked within the time provided. The number of copies of such statements and the time and places for filing them will be specified in notices of hearings to determine minimum wages for American Samoa. The prehearing statement shall describe the person's interest in the proceeding and shall contain (1) the prepared statement he proposes to give, if any; (2) a statement of the individual classifications and minimum wage rates, if any, he proposes to support; (3) the written data he proposes to introduce in evidence, including all tangible objective data to be submitted pursuant to § 511.13; (4) the names and addresses of the witnesses he proposes to call and a summary of the evidence he proposes to develop; (5) the name and address of the individual who will present his case; and (6) a statement of the approximate length of time his case will take. If the prehearing statement is in conformity with the above requirements, the person shall have the right to participate as a party. In accordance with section 6(c) of the Administrative Procedure Act, industry committee shall, after considering the advice of committee counsel, issue subpoenas authorized by section 9 of the Fair Labor Standards Act of 1938, to parties who make a request therefor accompanied by a clear showing of general relevance and reasonable scope of the evidence sought.

(c) Prehearing statements of parties shall be made available for examination at the offices where they are filed. Each person who files a prehearing statement should, if requested, make himself available for conference with the committee staff to make any needed clarification of his prehearing statement, and arrange details of presenting his testimony or case.

(d) In exceptional circumstances a person who has not filed the prehearing statement required by this section and who does not appear on a witness list filed by a party may nevertheless be permitted, in the discretion of the committee, to offer testimony.

[25 FR 14024, Dec. 31, 1960, as amended at 26 FR 6513, July 20, 1961; 27 FR 10651, Nov. 1, 1962; 39 FR 17947, May 22, 1974; 39 FR 33797, Sept. 20, 1974; 41 FR 26680, June 29, 1976]

§ 511.9 Requirements for quorum and decisions.

Two-thirds of the members of an industry committee shall constitute a quorum. Approval by a majority of all of the members of an industry committee or subcommittee shall be required for its report. Except as otherwise provided in this part, the chairman of the industry committee or subcommittee may make other decisions for the committee or subcommittee, but each such decision shall be subject to approval of a majority of the members present if any member objects.

§ 511.10 Subjects and issues.

(a) The declared policy of the Act with respect to industries or enterprises in Puerto Rico, the Virgin Islands, and American Samoa engaged in commerce or in the production of goods for commerce is to reach as rapidly as is economically feasible without substantially curtailing employment the object of the minimum wage rate which would apply in each such industry under paragraph (1) or (5) of section 6(a) but for section 6(c). Each industry committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry and will not give any industry in Puerto Rico, the Virgin Islands, or American Samoa a competitive advantage over any industry in the United States outside of Puerto Rico, the Virgin Islands and American Samoa; except that the committee, in determining wages for Puerto Rico and the Virgin Islands, shall recommend to the Secretary the minimum wage rate prescribed in section 6(a) or 6(b), which would be applicable but for section 6(c) unless there is substantial documentary evidence, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years or in the case of employees of public agencies other appropriate information, in the record which establishes that the industry, or a predominant portion thereof, is unable to pay that wage.

(b) Whenever the industry committee finds that a higher minimum wage may be determined for employees engaged in certain activities or in the manufacture of certain products in the industry than may be determined for other employees in the industry, the industry committee shall recommend such reasonable classifications within the industry as it determines to be necessary for the purpose of fixing for each classification the highest minimum wage rate (not in excess of that prescribed in paragraph (1) or (5) of section 6(a), or section 6(b) of the Act, whichever would be applicable) that can be determined for it under the principles set out in this section which will not substantially curtail employment in such classification and will not give a competitive advantage to any group in that industry. No classification shall be made, however, and no minimum wage rate shall be fixed solely on a regional basis or on the basis of age or sex. In determining whether there should be classification within an industry, in making such a classification, and in determining the minimum wage rate for such a classification, the committee shall consider, among other relevant factors, the following: (1) Competitive conditions as affected by transportation, living and production costs; (2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry.

[39 FR 17948, May 22, 1974]

§ 511.11 Pertinent data.

Among the types of data which may be considered pertinent to the subjects and issues delineated in § 511.10, are those revealing (a) employment and labor conditions and trends in Puerto Rico, the Virgin Islands, or American Samoa, as the case may be, and on the mainland, particularly since the promulgation of the presently applicable wage order, including such items as present and past employment, present wage rates and fringe benefits, changes in average hourly earnings or wage structure, provisions of collective bargaining agreements, hours of work, labor turnover, absenteeism, productivity, learning periods, rejection rates, and similar factors; (b) market conditions and trends in Puerto Rico, the Virgin Islands, or American Samoa, as the case may be, and on the mainland, including changes in the volume and value of production, market outlets, price changes, style factors, consumer demand, competitive relationships, tariff rates, and similar marketing factors; (c) comparative production costs in Puerto Rico, the Virgin Islands, or American Samoa, as the case may be, on the mainland, and in foreign countries, together with the factors responsible for differences; (d) financial conditions and trends since promulgation of the present wage order as reflected in profit and loss statements and balance sheets; and (e) data bearing on proper definitions of classifications within an industry.

§ 511.12 Committee and subcommittee meetings.

(a) The full committee, or a quorum thereof, will convene at the time and place appointed for an initial prehearing meeting as provided in the Secretary's order initiating the proceedings (note § 511.2). The full committee acting through a quorum will decide at that meeting whether it will preside at the reception of evidence at the hearing or will authorize a subcommittee to preside. Any resolution authorizing a subcommittee to hold the hearing shall provide a period of 30 days after (1) the subcommittee has filed its recommended report and (2) a transcript of the subcommittee hearing is made available to the parties, for the parties to file exceptions to the recommended report, and the committee shall meet promptly thereafter on call of its chairman or the Administrator to consider exceptions and prepare its final report.

(b) A committee may adjourn its meeting or hearing, or both, from time to time, and meet again, at hearing or otherwise, pursuant to the terms of adjournment, or on call of its chairman or the Administrator.

§ 511.13 Evidence.

In accordance with the notice of hearing, the committee and any authorized subcommittee will take official notice of the facts stated in the economic report to the extent they are not refuted by evidence received at the hearing. Other pertinent evidence available to the Department of Labor may be presented at the hearing. The committee itself may call witnesses not otherwise scheduled to testify. Oral or documentary evidence may be received, but the committee shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every interested person who has met the requirements for participation as a party shall have the right to present his case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination of witnesses called by others as may be required for a full and true disclosure of the facts. Testimony on behalf of an employer or group of employers as to inability to pay the minimum wage rate specified in paragraph (1) or (5) of section 6(a), or section 6(b) of the Act, whichever would be applicable, or as to inability to adjust to a higher minimum wage rate than prescribed by any applicable wage order of the Secretary, shall be supported by tangible objective data filed as part of the prehearing statement under § 511.8, including pertinent unabridged profit and loss statements and balance sheets for a representative period of years for the individual firm or firms involved. Such financial data shall include the most recent period of a year or fraction thereof for which data are available. Financial statements filed in accordance with this provision, except those relating to a period of less than a full fiscal year or a fiscal year ending less than 90 days prior to the filing of the pre-hearing statement, shall be certified by an independent public accountant or shall be sworn to conform to and be consistent with the corresponding income tax returns covering the same years. Evidence of witnesses not present at the hearing may be submitted only by affidavits received with, or as a part of, a prehearing statement which meets the requirements of § 511.8 and satisfactorily explains why each affiant cannot be present. Such affidavits will be received in evidence to the same extent that testimony from affiants would have been admitted had they been present. The committee will give such weight to these statements as it considers appropriate, and the fact that such affiants have not been subject to cross-examination may be considered, along with other relevant facts, in assessing the weight to be given such evidence.

[39 FR 17948, May 22, 1974]

§ 511.14 Procedure for receiving evidence.

(a) All testimony shall be given under oath or affirmation. Any party shall have the right to appear in person, by counsel, or by other specified representative. Misconduct at any hearing shall be grounds for summary exclusion from the hearing. The committee shall limit the testimony of any witness where appropriate to prevent the hearing from becoming unduly prolonged. The refusal of a witness to answer any question which has been ruled to be proper shall, in the discretion of the committee, be ground for striking all testimony given by the witness on related matters.

(b) Unless otherwise directed by the committee, witnesses shall be called in the following order: The committee economist qualified to testify concerning the content and preparation of the economic report, other witnesses called by the Department of Labor, witnesses called by the parties, other witnesses. Unless otherwise directed by the committee, all witnesses other than those called by the parties shall be examined in the following order: By committee counsel, by committee economist, by committee members, by the parties or their representatives. Witnesses called by the parties shall be examined first by the party calling them or by his specified representative, and then in the order herein indicated for all other witnesses. Redirect examination may be permitted in the discretion of the committee. Rebuttal evidence may be offered in the order and manner in this section provided for other evidence. To the extent not specified in this section, the order for calling and examining witnesses shall be specified by the chairman of the committee or subcommittee.

§ 511.15 Submittals prior to reports.

As soon as the receipt of evidence is concluded, a committee or subcommittee presiding at a hearing shall receive any proposed findings of fact and recommendations together with the reasons therefor submitted by any party. These submittals shall be oral unless otherwise directed by the committee or subcommittee. If, in the discretion of the committee or subcommittee such proposals should be in writing, it may grant such additional time as it deems essential.

§ 511.16 Reports.

Promptly after receipt of submissions under § 511.15, the committee or subcommittee will resolve the issues before it and prepare a report containing its findings of fact and recommendations. The report shall contain the committee's or the subcommittee's findings and conclusions as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record. When a committee, acting through a quorum, has presided at the reception of evidence, this report shall be its final report on the matters referred to it. Where, however, a subcommittee has presided at the reception of evidence, this report shall be an initial report, and the committee shall meet thereafter to review the report and rule on exceptions in its final report. Where the committee presides at the reception of evidence and proceeds to final decision every party shall be regarded as having objected to any wage rate or classification at variance with any he proposed in his prehearing statement unless he accepted such a rate or classification in any submittal made pursuant to § 511.15. A copy of the report shall be signed by each member of the committee who approves it, either at a meeting of the committee or by circulation of one or more copies among the members of the committee. At any time within 3 days after the committee report is signed by those who approve it, members dissenting therefrom may collectively or individually submit signed reports stating the reasons for their dissent.

§ 511.17 Records.

Each industry committee shall keep a journal recording the time and place of all its meetings, the members present, the votes, and other formal proceedings, including the appointment of subcommittees. Subcommittees shall keep a similar journal. No report of committee or subcommittee discussions need be included. All hearings shall be recorded. The record of any hearing before any subcommittee shall be transcribed. All hearings before a committee shall also be transcribed in whole or in part whenever the Administrator so directs upon his own motion or upon the motion of any party or any person compelled to submit data or evidence and upon the payment of costs prescribed by the Administrator. Promptly after completion of the committee's final report, the committee chairman shall certify the report and transmit it to the Administrator. As soon as practicable thereafter, the committee staff shall transmit to the Administrator (a) all committee and subcommittee journals, (b) all applications for leave to participate as parties together with the record of action thereon, and (c) the record, including any transcript of testimony and exhibits, together with all papers and requests filed in the proceedings. These documents shall be available for inspection and copying by interested persons at the Office of the Administrator during usual business hours.

[26 FR 6514, July 20, 1961]

§ 511.18 Publication and effective date of wage order.

Promptly after receipt of the committee report the Administrator shall publish the committee recommendations in the Federal Register and shall provide by order that the recommendations contained in such report shall take effect upon the expiration of 15 days after the date of such publication.

§ 511.19 Petitions.

Any interested person may at any time file a petition with the Administrator for an amendment to the regulations contained in this part or for an amendment to a wage order applicable to him. In view of the statutory requirement that the minimum rates of wages established by order under section 6 of the Act be reviewed by an industry committee at least biennially, substantial cause must be shown in support of any petition for an amendment of a wage order out of regular course. Any interested person may also file a petition at any time with the Administrator for a public hearing under section 13(e) of the Act to determine whether economic conditions warrant rules or regulations providing reasonable limitations or allowing reasonable variations, tolerances, or exemptions to or from any or all of the provisions of section 7 of the Act with respect to employees in American Samoa for whom the Secretary of Labor has established minimum wage rates under section 6(a)(3) of the Act and the regulations contained in this part. Whenever it appears to the Secretary of Labor, by reason of such a petition or otherwise, to be probable that such a hearing is likely to reveal that economic conditions warrant such action, notice of such hearing specifying the procedure to be followed will be published in the FEDERAL REGISTER.

[27 FR 10651, Nov. 1, 1962]

PART 515—UTILIZATION OF STATE AGENCIES FOR INVESTIGATIONS AND INSPECTIONS

Sec.
515.1 Definitions.
515.2 Agreements with State agencies.
515.3 Qualifications of the State agency.
515.4 Submission of plan.
515.5 Additional requirements.
515.6 Audits.
515.7 Transmission of official mail.
515.8 Enforcement.
515.9 Agreements and approved plans.
515.10 Amendments and repeal.

AUTHORITY: Sec. 4, 49 Stat. 2038, sec. 11(b), 52 Stat. 1066; 29 U.S.C. 211(b), 41 U.S.C. 38.

SOURCE: 13 FR 2161, 2163, Apr. 22, 1948, unless otherwise noted.

§ 515.1 Definitions.

As used in this part:

(a) *Acts.* The term "acts" means the Fair Labor Standards Act of 1938 (act of June 25, 1938; Chapter 676, 52 Stat. 1060, 29 U.S.C. 201) and the Public Contracts Act (act of June 30, 1936; 49 Stat. 2036; 41 U.S.C. 35-45).

(b) *Administrator.* The term "Administrator" means the Administrator of the Wage and Hour Division of the United States Department of Labor.

(c) *Division.* The term "Division" means the Wage and Hour Division of the United States Department of Labor.

(d) *State.* The term "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(e) *State agency.* The term "State agency" means the agency in the State charged with the administration of labor laws which necessitate inspection of places of employment for (1) enforcement of State child-labor regulations and (2) enforcement of State maximum-hour or State minimum-wage regulations.

(f) *Official forms.* The term "official forms" means forms prescribed by the Administrator or the Secretary of Labor.

§ 515.2 Agreements with State agencies.

(a) *Purpose.* The Secretary and the Administrator may enter into agreements with State agencies for the utilization of services of State and local agencies and their employees in making investigations and inspections under the acts and for reimbursement therefor, when such State agencies have submitted plans of cooperation for such purposes and such plans have been found to be reasonably appropriate and adequate to carry out the respective functions of the Secretary and the Administrator.

(b) *Certificates of attorneys general.* No such agreement shall become effective and operative until a statement of the Attorney General of the State, or, if the Attorney General is not authorized to make such a statement, the State official who is so authorized, has been received by the Division and the Secretary of Labor certifying that the agreement is valid in the form as executed under the laws of the State.

§ 515.3 Qualifications of the State agency.

The State agency shall have as its primary function the administration of State labor laws and shall be under the direction of an executive who gives full time to the work of the agency. The agency shall be engaged in inspecting places of employment for (a) enforcement of State child-labor laws and regulations, and (b) enforcement of State maximum hour or minimum-wage laws and regulations. An administrative division of the State agency shall be designated to make investigations and inspections under the acts; qualified staff, under adequate supervision, shall be specifically assigned for work connected with State and Federal child-labor, maximum-hour and minimum-wage laws and regulations; and provision shall be made to inspect any establishment subject to the acts.

§ 515.4 Submission of plan.

The State agency shall submit a plan, in quadruplicate, which shall include the following:

(a) A copy of the act establishing the State agency, copies of the laws administered by the State agency, and if there is an act specifically authorizing the State to cooperate with the Division or the Secretary of Labor, or both, a copy of such act.

(b) A description of the organization of the State agency, illustrated by organization charts, showing the delegation of responsibility and lines of authority to be followed within the agency in the enforcement of the act and State labor laws.

(c) A description (1) of the manner in which investigations and inspections under the acts will be coordinated with the investigations and inspections for enforcement of State child-labor, maximum-hour and minimum-wage laws and regulations; (2) of the location of offices of the administrative division designated to make inspections under the acts, with the job titles of employees located in each such office and employees assigned to work in connection with the acts so designated; and (3) of the manner in which the work of inspectors will be supervised.

(d) Provisions for the establishment and maintenance of personnel administration, with respect to personnel engaged in work under the acts for the Division and the Secretary of Labor in accordance with the following standards:

(1) Job classifications based upon an analysis of the duties and responsibilities of positions;

(2) A compensation schedule adjusted to State salary schedules for similar positions: *Provided, however,* That all salaries paid by the State for services rendered in accordance with an agreement entered into pursuant to § 515.2 shall be on the basis of applicable State laws or regulations, or in the absence of such applicable laws or regulations, on the approved and usual scale pair by the State for similar services and shall in no case exceed salaries paid for comparable Federal positions in the competitive classified service. Allowances for necessary traveling expenses shall be on the basis of State laws and regulations governing travel allowances;

(3) Assignment of personnel to Federal work only when their qualifications conform substantially with qualifications of Federal employees engaged in similar work, such assignment to be made only after submission to and approval by the Division and the Secretary of Labor of a statement of the training and experience of each person who will engage in Federal work;

(4) Appointment of new personnel on the basis of merit, either (i) from lists of eligible persons certified in the order of merit, secured under a merit system through State-wide competitive examinations which prescribe requirements of training and experience in substantial conformity with Federal civil service requirements for similar positions or (ii) from lists taken from Federal registers established through competitive examinations for similar positions, it being understood that such registers may be broken down by States;

(5) Adequate training of staff;

(6) Promotion on the basis of qualifications and performance;

(7) Security of tenure assured satisfactory employees, including right of notice and hearing prior to demotion or dismissal;

(8) Prohibition against employees engaging in political activities other than the exercise of their right to vote and to express privately their opinions on political questions.

(e) A budget which shall show, in detail, estimated expenditures by the State agency on behalf of the Division and the Secretary of Labor for services to be rendered in connection with the administration of the acts and a budget which shall show estimated expenditure for the enforcement of comparable State laws and regulations during the period covered by the agreement; a statement showing funds appropriated to or allocated for meeting the budget for estimated State expenditures; and a statement showing expenditures by the State agency for the enforcement of comparable State laws and regulations during the last fiscal year.

(f) A statement of State requirements in regard to fiscal practices and to appointment of personnel, together with copies of the laws and regulations setting forth such requirements.

(g) A statement from the Attorney General of the State or, if the Attorney General is not authorized to make such a statement, from the State official who is so authorized certifying that the State agency has authority to enter into an Agreement with the Division and the Secretary of Labor in accordance with this part.

§ 515.5 Additional requirements.

(a) The State Agency shall follow the procedure set forth in the Inspection Manual for the enforcement of the act and such supplements to or provisions thereof as may be issued from time to time by the Division or the Secretary of Labor; use official forms for recording findings; make reports as required; and carry on the work connected with the administration of the acts in conformity with the plans and budget agreed upon and with the instructions and policies of the Division and the Secretary of Labor.

(b) Representatives of the Division and the Secretary of Labor may at any time, upon notifying the State agency, make such inspections and investigations and secure such information as may be necessary for the administration of the acts.

§ 515.6 Audits.

The accounting records and the supporting data pertaining to expenditures for investigations and inspections under the acts shall be subject to audit by the Division and the Secretary of Labor, annually, or so often as the Administrator and the Secretary of Labor, may require.

§ 515.7 Transmission of official mail.

Subject to the requirements of law and of the regulations of the Post Office Department, franked self-addressed envelopes may be used for communications from the field staff to a State official designated by the Division and the Secretary of Labor, and for communication from the State agency to the Division or the Secretary of Labor.

§ 515.8 Enforcement.

All litigation relating to the enforcement of the acts, other than civil actions for the recovery of wages due instituted pursuant to section 16(b) of the Fair Labor Standards Act of 1938 and all administrative proceedings instituted pursuant to section 5 of the Public Contracts Act shall be undertaken by and be under the direction and control of the Federal Government. Any State agency intending to institute a civil action in behalf of an employee or employees for the recovery of wages due, pursuant to section 16(b) of the Fair Labor Standards Act of 1938 shall notify the Division and the Secretary of Labor prior to the institution of such action.

§ 515.9 Agreements and approved plans.

Agreements and approved plans incorporated therein may be amended upon the consent of the parties thereto.

§515.10 Amendments and repeal.

This part may be amended or repealed by appropriate joint regulations issued by the Secretary of Labor and the Administrator: *Provided, however,* That no such amendment or repeal shall be effective as to any agreement previously entered into by a State agency without its consent thereto.

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

INTRODUCTORY

Sec.
516.1 Form of records; scope of regulations.

Subpart A—General Requirements

516.2 Employees subject to minimum wage or minimum wage and overtime provisions; section 6 or sections 6 and 7(a) of the Act.
516.3 Bona fide executive, administrative, and professional employees (including academic administrative personnel and teachers in elementary or secondary schools), and outside sales employees as referred to in section 13(a) (1) of the Act—items required.
516.4 Posting of notices.
516.5 Records to be preserved 3 years.
516.6 Records to be preserved 2 years.
516.7 Place for keeping records and their availability for inspection.
516.8 Computations and reports.
516.9 Petitions for exceptions.
516.10 Amendment of regulations.

Subpart B—Records Pertaining to Employees Subject to Miscellaneous Exemptions Under the Act; Other Special Requirements

516.11 Employees exempt from both minimum wage and overtime pay requirements under section 13(a) (2), (3), (4), (5), (8), (9), (10), (11), (12), (13), or (14) of the Act.
516.12 Employees exempt from overtime pay requirements pursuant to section 13(b) (1), (2), (3), (4), (5), (7), (9), (10), (15), (16), (17), or (18) of the Act, and hotel, motel, and restaurant employees exempt from overtime pay under section 13(b) (8).
516.13 Livestock auction employees exempt from overtime pay requirements under section 13(b)(13) of the Act.
516.14 Country elevator employees exempt from overtime pay requirements under section 13(b)(14) of the Act.
Sec.
516.15 Local delivery employees exempt from overtime pay requirements pursuant to section 13(b)(11) of the Act.
516.16 Commission employees of a retail or service establishment exempt from overtime pay requirements pursuant to section 7(i) of the Act.
516.17 Seamen exempt from overtime pay requirements pursuant to section 13(b)(6) of the Act.
516.18 Employees employed in industries "of a seasonal nature" who are partially exempt from overtime pay requirements pursuant to section 7(c) of the Act.
516.19 Employees engaged in industries handling and processing perishable agricultural commodities who are partially exempt from overtime pay requirements pursuant to section 7(d) of the Act.
516.20 Employees under certain collective bargaining agreements who are partially exempt from overtime pay requirements as provided in section 7(b)(1) or section 7(b)(2) of the Act.
516.21 Bulk petroleum employees partially exempt from overtime pay requirements pursuant to section 7(b)(3) of the Act.
516.22 Employees of residential care establishments or bowling establishments partially exempt from overtime pay requirements pursuant to section 13(b)(8) or 13(b)(19) of the Act.
516.23 Hospital employees compensated for overtime work on the basis of a 14-day work period pursuant to section 7(j) of the Act.
516.24 Employees employed under section 7(f) "Belo" contracts.
516.25 Employees paid for overtime on the basis of "applicable" rates provided in sections 7(g)(1) and 7(g)(2) of the Act.
516.26 Employees paid for overtime at premium rates computed on a "basic" rate authorized in accordance with section 7(g)(3) of the Act.
516.27 "Board, lodging, or other facilities" under section 3(m) of the Act.
516.28 Tipped employees.
516.29 Employees under more than one minimum hourly rate.
516.30 Learners, apprentices, messengers, students, or handicapped workers employed under special certificates as provided in section 14 of the Act.
516.31 Industrial homeworkers.
516.32 Employees subject to the equal pay provisions of the Act, as set forth in section 6(d).
516.33 Employees employed in agriculture.
516.34 Domestic service employees.

AUTHORITY: Sec. 11, 52 Stat. 1066, as amended; 29 U.S.C. 211, unless otherwise noted.

SOURCE: 32 FR 9551, July 1, 1967, unless otherwise noted.

BEST DOCUMENT AVAILABLE

OMB CONTROL NO.: 1215-0017. (47 FR 145, Jan. 5, 1982)

INTRODUCTORY

§ 516.1 Form of records; scope of regulations.

(a) *Form of records.* No particular order or form of records is prescribed by the regulations in this part. However, every employer who is subject to any of the provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as the "Act"), is required to maintain records containing the information and data required by the specific sections of this part.

(b) *Scope of regulations.* (1) The regulations in this part are divided into two subparts. Subpart A of this part contains the requirements applicable to all employers employing covered employees, including the general requirements relating to the posting of notices, the preservation and location of records, and similar general provisions. This subpart also contains the requirements applicable to employers of employees to whom both the minimum wage provisions of section 6 and the overtime pay provisions of section 7(a) of the Act apply. As most covered employees fall within this category, employers, in most instances, will be concerned principally with the recordkeeping requirements of Subpart A of this part. Section 516.3 thereof contains the requirements relating to executive, administrative, and professional employees (including academic administrative personnel or teachers in elementary or secondary schools), and outside sales employees.

(2) Subpart B of this part deals with the information and data which must be kept with respect to employees (other than executive, administrative, etc., employees) who are subject to any of the exemptions provided in the Act, and with special provisions relating to such matters as deductions from and additions to wages for "board, lodging, or other facilities," industrial homeworkers, employees dependent upon tips as part of wages, and employees subject to more than one minimum wage. The sections in Subpart B of this part require the recording of more, less, or different items of information or data than required under the generally applicable recordkeeping requirements of Subpart A of this part.

Subpart A—General Requirements

§ 516.2 Employees subject to minimum wage or minimum wage and overtime provisions; section 6 or sections 6 and 7(a) of the Act.

(a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each and every employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records. This shall be the same name as that used for Social Security record purposes,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., or Miss),

(5) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees,

(6) (i) Regular hourly rate of pay for any week when overtime is worked and overtime excess compensation is due under section 7(a) of the Act, (ii) basis on which wages are paid (such as "$2 hr."; "$16 day"; "$80 wk."; "$80 wk. plus 5 percent commission on sales over $800 wk."), and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate"

(these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" shall be any consecutive 24 hours),

(8) Total daily or weekly straight-time earnings or wages, that is, the total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation,

(9) Total overtime excess compensation for the workweek, that is, the excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked,

(10) Total additions to or deductions from wages paid each pay period. Every employer making additions to or deductions from wages shall also maintain, in individual employee accounts, a record of the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

(b) *Records of retroactive payment of wages.* Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to section 16(c) of the Act, shall:

(1) Record and preserve, as an entry on his payroll or other pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on the receipt form provided or authorized by the Wage and Hour Division, and (i) preserve a copy as part of his records, (ii) deliver a copy to the employee, and (iii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Administrator or his authorized representative within 10 days after payment is made.

(c) *Employees working on fixed schedules.* With respect to employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each week as required by paragraph (a)(7) of this section, the schedule of daily and weekly hours the employee normally works, and

(1) In weeks in which an employee adheres to this schedule, indicates by check mark, statement, or other method that such hours were in fact actually worked by him, and

(2) In weeks in which more or less than the scheduled hours are worked, shows the exact number of hours worked each day and each week.

§ 516.3 Bona fide executive, administrative, and professional employees (including academic administrative personnel and teachers in elementary or secondary schools), and outside sales employees as referred to in section 13(a)(1) of the Act—items required.

With respect to persons employed in a bona fide executive, administrative, or professional capacity (including employees employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools), or in the capacity of outside salesman, as defined in Part 541 of this chapter (pertaining to so-called "white collar" employee exemptions), employers shall maintain and preserve records containing all the information and data required by § 516.2(a) except paragraphs (a)(6) through (10) thereof, and, in addition thereto the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites. (This may be shown as "$725 mo. . . . $165 wk. . . . $1,200 mo. plus 2 percent commission on gross sales . . . on fee basis per schedule No. 2" with appropriate addenda such as "plus hospitalization and insurance plan A," "benefit package B," "2 weeks' paid vacation," etc.)

[38 FR 7115, Mar. 16, 1973]

§ 516.4 Posting of notices.

Every employer employing any employees who are (a) engaged in commerce or in the production of goods for commerce or (b) employed in an enterprise engaged in commerce or in the production of goods for commerce, and who are not specifically exempt from both the minimum wage provisions of section 6 and the overtime provisions of section 7(a) of the Act, shall post and keep posted such notices pertaining to the applicability of the Act, as shall be prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy on the way to or from their place of employment.

§ 516.5 Records to be preserved 3 years.

Each employer shall preserve for at least 3 years:

(a) *Payroll records.* From the last date of entry, all those payroll or other records containing the employee information and data required under any of the applicable sections of this part, and

(b) *Certificates, agreements, plans, notices, etc.* From their last effective date, all written:

(1) Collective bargaining agreements relied upon for the exclusion of certain costs under section 3(m) of the Act,

(2) Collective bargaining agreements, under section 7(b)(1) or 7(b)(2) of the Act, and any amendments or additions thereto,

(3) Plans, trusts, employment contracts, and collective bargaining agreements under section 7(e) of the Act,

(4) Individual contracts or collective bargaining agreements under section 7(f) of the Act. Where such contracts or agreements are not in writing, a written memorandum summarizing the terms of each such contract or agreement,

(5) Written agreements or memoranda summarizing the terms of oral agreements or understandings under section 7(g) or 7(j) of the Act, and

(6) Certificates and notices listed or named in any applicable section of this part.

(c) *Sales and purchase records.* A record of (1) total dollar volume of sales or business, and (2) total volume of goods purchased or received during such periods (weekly, monthly, quarterly, etc.) and in such form as the employer maintains in the ordinary course of his business.

§ 516.6 Records to be preserved 2 years.

(a) Supplementary basic records: Each employer required to maintain records under this part shall preserve for a period of at least 2 years.

(1) *Basic employment and earnings records.* From the date of last entry, all basic time and earning cards or sheets of the employer on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the individual employee's daily, weekly, or pay period amounts of work accomplished (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees.

(2) *Wage rate tables.* From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime excess computation, and

(3) *Worktime schedules.* From their last effective date, all schedules or tables of the employer which establish the hours and days of employment of individual employees or of separate work forces.

(b) Order, shipping, and billing records: Each employer shall also preserve for at least 2 years from the last date of entry the originals or true copies of any and all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers (not including individual sales slips, cash register tapes or the like) which the employer retains or makes in the course of his business or operations.

(c) Records of additions to or deductions from wages paid: Each employer who makes additions to or deductions from wages paid shall preserve for at least 2 years from the date of last entry.

(1) Those records of individual employee accounts referred to in § 516.2(a)(10),

(2) All employee purchase orders, or assignments made by employees, all

copies of addition or deduction statements furnished employees, and

(3) All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

(d) Each employer shall preserve for at least two years the records he makes of the kind described in § 516.32 which explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment.

§ 516.7 Place for keeping records and their availability for inspection.

(a) *Place of records.* Each employer shall keep the records required by the regulations in this part safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Administrator or his duly authorized and designated representative.

(b) *Inspection of records.* All records shall be open at any time to inspection and transcription by the Administrator or his duly authorized and designated representative.

§ 516.8 Computations and reports.

Each employer required to maintain records under this part shall make such extension, recomputation, or transcription of his records and shall submit to the Wage and Hour Division such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in his records as the Administrator or his duly authorized and designated representative may request in writing.

§ 516.9 Petitions for exceptions.

(a) *Submission of petitions for relief.* Any employer or group of employers who, due to peculiar conditions under which he or they must operate, desires authority to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period specified in the regulations in this part, may submit a written petition to the Administrator setting forth the authority desired and the reasons therefor.

(b) *Action on petitions.* If, on review of the petition and after completion of any necessary investigation supplementary thereto, the Administrator shall find that the authority prayed for, if granted, will not hamper or interfere with enforcement of the provisions of the Act or any regulation or orders issued thereunder, he may then grant such authority but limited by such conditions as he may determine are requisite, and subject to subsequent revocation. Where the authority granted hereunder is sought to be revoked for failure to comply with the conditions determined by the Administrator to be requisite to its existence, the employer or groups of employers involved shall be notified in writing of the facts constituting such failure and afforded an opportunity to achieve or demonstrate compliance.

(c) *Compliance after submission of petitions.* The submission of a petition or the delay of the Administrator in acting upon such petition shall not relieve any employer or group of employers from any obligations to comply with all the requirements of the regulations in this part applicable to him or them. However, the Administrator shall give notice of the denial of any petition with due promptness.

§ 516.10 Amendment of regulations.

(a) *Petitions for revision of regulations.* Any person wishing a revision of any of the terms of the regulations in this part with respect to records to be kept by employers may submit to the Administrator a written petition setting forth the changes desired and the reasons for proposing them.

(b) *Action on such petitions.* If upon inspection of the petition the Administrator believes that reasonable grounds are set forth for amendment of the regulations in this part, the Administrator shall either schedule a hearing with due notice to interested persons, or make other provisions for affording interested persons an opportunity to present data, views, or arguments relating to any proposed changes.

Subpart B—Records Pertaining to Employees Subject to Miscellaneous Exemptions Under the Act; Other Special Requirements

§ 516.11 Employees exempt from both minimum wage and overtime pay requirements under section 13(a) (2), (3), (4), (5), (8), (9), (10), (11), (12), (13), or (14) of the Act.

With respect to each and every employee covered by the Act, but to whom the employer is neither required to pay the minimum wage provided in section 6 nor overtime compensation as provided in section 7, due to the applicability of section 13(a) (2), (3), (4), (5), (8), (9), (10), (11), (12), (13), or (14) of the Act, employers shall maintain and preserve records containing the information and data required by paragraphs (a) (1) through (4) of § 516.2 and, in addition thereto, information indicating the place or places of employment.

§ 516.12 Employees exempt from overtime pay requirements pursuant to section 13(b) (1), (2), (3), (4), (5), (7), (9), (10), (15), (16), (17), or (18) of the Act, and hotel, motel, and restaurant employees exempt from overtime pay under section 13(b)(8).

Every employer operating under a complete exemption from the overtime pay requirements of section 7(a) of the Act as provided in section 13(b) (1), (2), (3), (4), (5), (7), (8), (9), (10), (15), (16), (17), or (18) of the Act, shall maintain and preserve payroll or other records, with respect to each and every employee to whom section 6 of the Act applies but to whom neither section 7(a) nor 7(b) applies, containing all the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) thereof and, in addition thereto, containing information and data regarding the basis on which wages are paid (such as "$2 hr."; "$16 day"; "$80 wk."; "$80 wk. plus 5 percent commission on sales over $800 wk.").

§ 516.13 Livestock auction employees exempt from overtime pay requirements under section 13(b)(13) of the Act.

(a) With respect to each and every employee covered by the Act, but to whom the employer is not required to pay overtime compensation as provided in section 7, except as provided in, and due to the applicability of, section 13(b)(13) of the Act, the employer shall maintain and preserve records containing the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition thereto, the employer shall maintain and preserve the records specified in paragraphs (b) and (c) of this section.

(b) For each workweek in which the employee is employed both in agriculture and in connection with livestock auction operations, the employer shall maintain and preserve records of: (1) The total number of hours worked by each such employee, (2) the total number of hours in which he was employed in agriculture during that workweek, and the total number of hours in which he was employed in connection with livestock auction operations during that workweek, and (3) the total straight-time earnings for his employment in connection with livestock auction operations during that workweek.

(c) The employer shall maintain and preserve records indicating place or places of employment.

§ 516.14 Country elevator employees exempt from overtime pay requirements under section 13(b)(14) of the Act.

(a) With respect to each and every employee covered by the Act, but to whom the employer is not required to pay overtime compensation as provided in section 7, due to the applicability of section 13(b)(14) of the Act, the employer shall maintain and preserve records containing the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) and, in addition thereto, the information and data required by paragraphs (b) and (c) of this section.

(b) For each workweek, the employer shall maintain and preserve records containing: (1) The names of all employees described in paragraph (a) of this section actually employed (suffered or permitted to work) during any part of the workweek and (2) for all other persons employed in the elevator, whether or not covered by the Act, the following information:

(i) Name in full,

(ii) Name of employer, and

(iii) Occupation in which employed in the elevator.

(c) Information demonstrating that the "area of production" requirements of Part 536 of this chapter are met.

§ 516.15 Local delivery employees exempt from overtime pay requirements pursuant to section 13(b)(11) of the Act.

Every employer operating under the complete exemption from the overtime pay requirements as provided in section 13(b)(11) of the Act, shall maintain and preserve payroll or other records, with respect to each and every employee to whom section 6 of the Act applies but to whom neither section 7(a) nor 7(b) applies, containing all the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) thereof and, in addition thereto, containing information and data regarding the basis on which wages are paid (such as "trip rate (Town X to Town Y and return) $17.16": "$80 week plus 3 percent commission on all cases delivered and 4 cents per case of empties returned"). Records shall also contain the following information: (a) A copy of the Administrator's finding under Part 551 of this chapter with respect to the plan under which such employees are compensated; (b) a statement or description of any changes made in the trip rate or other delivery payment plan of compensation for such employees since its submission for such finding; (c) identification of each employee employed pursuant to such plan and his work assignments and duties; and (d) a computation for each quarter-year of the average weekly hours of full-time employees employed under the plan during the most recent representative annual period as described in § 551.8(g) (1) and (2) of this chapter.

§ 516.16 Commission employees of a retail or service establishment exempt from overtime pay requirements pursuant to section 7(i) of the Act.

With respect to employees of a retail or service establishment who are exempt from the overtime pay requirements pursuant to the provisions of section 7(i), employers shall maintain and preserve payroll and other records, with respect to each and every such employee, containing all the information and data required by § 516.2(a) except paragraphs (a) (6), (8), (9), and (11), and in addition thereto:

(a) A symbol or letter placed on the payroll records identifying each employee who is paid pursuant to section 7(i).

(b) An indication whether the employee's regular rate of pay in each workweek (see §§ 779.428 and 779.429 of this chapter) is in excess of one and one-half times the minimum hourly rate applicable to him under section 6 of the Act and that basic records are available and will be kept to demonstrate this fact.

(c) A copy of the agreement or understanding under which section 7(i) is utilized or, if such agreement or understanding is not in writing, a memorandum summarizing its terms including the basis of compensation (such as $100 weekly draw against 5 percent commission on sales), and showing the applicable representative period and the date it was entered into and how long it remains in effect. Such agreements or understandings, or summaries may be individually or collectively drawn up.

(d) Total compensation paid to each employee each pay period (showing separately the amount of commissions and the amount of noncommission straight-time earnings).

[33 FR 17242, Nov. 21, 1968]

§ 516.17 Seamen exempt from overtime pay requirements pursuant to section 13(b)(6) of the Act.

Every employer operating under the complete exemption from the overtime pay requirements of section 7(a) of the Act as provided in section 13(b)(6) of the Act shall maintain and preserve payroll or other records, with respect to each and every employee employed as a seaman to whom section 6 of the Act applies, but to whom neither section 7(a) nor 7(b) applies, containing all the information required by § 516.2(a) except paragraphs (a) (5) through (9) thereof and, in addition thereto, the following:

(a) Basis on which wages are paid (such as "$2 hr."; "$16 day"; "$350 mo."),

(b) Hours worked each workday and total hours worked each pay period (for purposes of this section, a "workday" shall be any consecutive 24 hours; the "payperiod" shall be the period covered by the wage payment, as provided in section 6(a)(4) of the Act),

(c) Total straight-time earnings or wages for each such pay period, and

(d) The name, type, and documentation, registry number, or other identification of the vessel or vessels upon which employed.

§ 516.18 Employees employed in industries "of a seasonal nature" who are partially exempt from overtime pay requirements pursuant to section 7(c) of the Act.

(a) *Items required.* With respect to employees employed pursuant to the partial overtime pay exemption provided in section 7(c) of the Act and Part 526 of this chapter, employers shall maintain and preserve records containing all the information and data required by § 516.2, and shall record the daily as well as the weekly overtime compensation. The employer shall also note in the records the beginning and ending of each workweek during which the establishment operates under this exemption.

(b) *Posting of notice of weeks taken under the exemption.* (1) In addition every employer shall prepare a legible printed, typewritten, or handwritten (in ink) notice reading:

NOTICE—OVERTIME PAYMENT

This establishment has taken the workweek beginning ----- and ending ----- as one of the ----- exempt workweeks permitted under section 7(c) of the Fair Labor Standards Act, when overtime at not less than time and one-half the regular hourly rate need be paid only for any time worked over 10 hours a day or 50 hours a week.

This week completes the ----- week of the permissible exempt workweeks.

Date --------------------

Signed --------------------

(2) On the date when employees are paid for any pay period which includes any workweek or part thereof during which the establishment operates under the exemption provided under section 7(c) of the Act, the employer shall, after making appropriate notations in the blank spaces in the above form, either (i) prominently post and display that notice at the pay window or other place or places where the employees affected are being paid or (ii) otherwise notify each such employee, in writing, to the same effect.

§ 516.19 Employees engaged in industries handling and processing perishable agricultural commodities who are partially exempt from overtime pay requirements pursuant to section 7(d) of the Act.

(a) *Items required.* With respect to employees employed pursuant to the partial overtime pay exemption provided in section 7(d) of the Act and Part 526 of this chapter, employers shall maintain and preserve records containing all the information and data required by § 516.2, and shall record the daily as well as the weekly overtime compensation. The employer shall also note in the records the beginning and ending of each workweek during which the establishment operates under this exemption.

(b) *Posting of notice of weeks taken under the exemption.* (1) In addition, every such employer shall prepare a legible printed, typewritten or handwritten (in ink) notice reading:

NOTICE—OVERTIME PAYMENTS

This establishment has taken the workweek beginning ----- and ending -----as one of the ----- exempt workweeks permitted under section 7(d) of the Fair Labor Standards Act when overtime at not less than time and one-half the regular hourly rate need be paid only for any time worked over 10 hours a day or 48 hours a week.

This week completes the ----- week of the permissible exempt workweeks.

Date --------------------

Signed --------------------

(2) On the date when employees are paid for any pay period which includes any workweek or part thereof during which the establishment operates under the partial overtime exemption provided in section 7(d) of the Act, the employer shall, after making appropriate notations in the blank spaces in the above form, either (i) prominently post and display that notice at the pay window or other place or places where the employees affected are being paid, or (ii) otherwise notify each such employee, in writing, to the same effect.

§ 516.20 Employees under certain collective bargaining agreements who are partially exempt from overtime pay requirements as provided in section 7(b)(1) or section 7(b)(2) of the Act.

(a) *Items required.* Every employer of employees who are employed:

(1) In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employees shall be employed more than 1,040 hours during any period of 26 consecutive weeks as provided in section 7(b)(1) of the Act, or

(2) In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall be employed not more than 2,240 hours during a specified period of 52 consecutive weeks and shall be guaranteed employment as provided in section 7(b)(2) of the Act,

shall maintain and preserve payroll or other records, with respect to each and every such employee, containing all the information and data required by § 516.2, and shall record daily as well as weekly overtime excess compensation.

(b) *Submission of copy of agreement to the Administrator.* The employer shall also keep copies of such collective bargaining agreement and such National Labor Relations Board certification as part of his records and, within 30 days after such collective bargaining agreement has been made, report and file a copy thereof with the Administrator, Wage and Hour Division, at Washington, D.C. 20210. Likewise, the employer shall keep a copy of each amendment or addition thereto and within 30 days after such amendment or addition has been agreed upon, shall report and file a copy thereof with the Administrator.

(c) *Record of persons and periods employed under agreements.* The employer shall also make, keep, and preserve a record, either separately or as a part of the payroll:

(1) Listing each and every employee employed pursuant to each such collective bargaining agreement and each amendment and addition thereto.

(2) Indicating the period or periods during which the employee has been or is employed pursuant to an agreement under section 7(b)(1) or 7(b)(2) of the Act, and

(3) Showing the total hours worked during any period of 26 consecutive weeks, if the employee is employed in accordance with section 7(b)(1) of the Act, or during the specified period of 52 consecutive weeks, if employed in accordance with section 7(b)(2) of the Act.

§ 516.21 Bulk petroleum employees partially exempt from overtime pay requirements pursuant to section 7(b)(3) of the Act.

Every employer operating under the partial exemption from the overtime pay requirements of section 7(a) of the Act, as provided in section 7(b)(3), shall maintain and preserve records containing all the information and data required by § 516.2(a), and in addition shall record the daily as well as the weekly overtime compensation paid to the employees and the rate per hour and the total pay for any time worked between the 40th and 56th hour of the workweek.

§ 516.22 Employees of residential care establishments or bowling establishments partially exempt from overtime pay requirements pursuant to section 13(b)(8) of 13(b)(19) of the Act.

Every employer, with respect to each of his employees employed pursuant to the provisions of section 13(b)(8) of the Act providing a partial exemption from the overtime pay requirements for employees employed by a residential care establishment described therein, or employed pursuant to the provisions of section 13(b)(19) providing a partial exemption from the overtime requirements for employees of a bowling establishment, shall maintain and preserve the records prescribed in § 516.2(a), except that the record of the regular hourly rate of pay under § 516.2(a)(6)(i) shall be required only in any week when overtime is worked and overtime excess compensation is due under section 13(b)(8) or section 13(b)(19) of the Act, as the case may be.

§ 516.23 Hospital employees compensated for overtime work on the basis of a 14-day work period pursuant to section 7(j) of the Act.

With respect to each employee compensated for overtime work on the basis of a work period of 14 consecutive days pursuant to an agreement or understanding under section 7(j) of the Act pertaining to hospital employees, employers shall maintain and preserve

(a) The records required by § 516.2 except paragraphs (a) (5) and (7) through (9) thereof, and in addition thereto:

(1) Time of day and day of week on which the employee's 14-day work period begins,

(2) Hours worked each workday and total hours worked each 14-day work period,

(3) Total straight-time wages paid for hours worked during the 14-day period,

(4) Total overtime excess compensation paid for hours worked in excess of 8 in a workday and 80 in the work period.

(b) A copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations or, if such agreement or understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect.

§ 516.24 Employees employed under section 7(f) "Belo" contracts.

Every employer shall maintain and preserve payroll or other records, with respect to each and every employee to whom both sections 6 and 7(f) of the Act apply, containing all the information and data required by § 516.2(a) except paragraphs (a) (8) and (9), and, in addition thereto, the following:

(a) Total weekly guaranteed earnings,

(b) Total weekly compensation in excess of weekly guaranty,

(c) A copy of the bona fide individual contract or the agreement made as a result of collective bargaining by representatives of employees, pursuant to which the employee is employed, or where such contract or agreement is not in writing a written memorandum summarizing its terms.

§ 516.25 Employees paid for overtime on the basis of "applicable" rates provided in sections 7(g)(1) and 7(g)(2) of the Act.

With respect to each and every employee compensated for overtime work in accordance with section 7(g)(1) or 7(g)(2) of the Act, employers shall maintain and preserve records containing all the information and data required by § 516.2(a) except paragraphs (a) (6) and (9) thereof and, in addition thereto, the following:

(a) (1) Each hourly or piece rate at which the employee is employed, (2) basis on which wages are paid, and (3) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate,"

(b) The number of overtime hours worked in the workweek at each applicable hourly rate or the number of units of work performed in the workweek at each applicable piece rate during the overtime hours,

(c) Total weekly overtime excess compensation at each applicable rate; that is, the excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked,

(d) The date of the agreement or understanding to use this method of compensation and the period covered thereby. If the employee is part of a workforce or employed in or by an establishment all of whose workers have agreed to use this method of compensation a single notation of the date of the agreement or understanding and the period covered will suffice.

§ 516.26 Employees paid for overtime at premium rates computed on a "basic" rate authorized in accordance with section 7(g)(3) of the Act.

With respect to each and every employee compensated for overtime hours at a "basic" rate which is substantially equivalent to the employee's average hourly earnings, as authorized in accordance with section 7(g)(3) of the Act and Part 548 of this chapter, employers shall maintain and preserve records containing all the information and data required by § 516.2 except paragraph (a)(6) thereof and, in addition thereto, the following:

(a) (1) The hourly rates, piece rates, or commission rates applicable to each type of work performed by the employee, (2) the computation establishing the basic rate at which the employee is compensated for overtime hours (if the employee is part of a workforce or employed in or by an establishment all of whose workers have agreed to accept this method of compensation, a single entry of this computation will suffice), (3) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate."

(b) (1) Identity of representative period for computing the basic rate, (2) the period during which the established basic rate is to be used for computing overtime compensation, (3) information which establishes that there is no significant difference between the pertinent terms, conditions and circumstances of employment in the period selected for the computation of the basic rate and those in the period for which the basic rate is used for computing overtime compensation, which could affect the representative character of the period from which the basic rate is derived.

(c) A copy of the written agreement or, if there is no such agreement, a memorandum summarizing the terms of and showing the date and period covered by the oral agreement or understanding to use this method of computation. If the employee is one of a group, all of whom have agreed to use this method of computation, a single memorandum will suffice.

§ 516.27 "Board, lodging, or other facilities" under section 3(m) of the Act.

(a) In addition to keeping other records required by the regulations in this part, an employer who makes deductions from the wages of his employees for "board, lodging, or other facilities" (as these terms are used in sec. 3(m) of the Act) furnished to them by the employer or by an affiliated person, or who furnishes such "board, lodging, or other facilities" to his employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility except as noted in paragraph (c) of this section. Separate records of the cost of each item furnished to an employee need not be kept. The requirements may be met by keeping combined records of the costs incurred in furnishing each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Thus, in the case of an employer who furnishes housing, separate cost records need not be kept for each house. The cost of maintenance and repairs for all the houses may be shown together. Original cost and depreciation records may be kept for groups of houses acquired at the same time. Costs incurred in furnishings similar or closely related facilities, moreover, may be shown in combined records. For example, if joint costs are incurred in furnishing both housing and electricity and the records are not readily separable, the housing and electricity together may be treated as a "class" of facility for recordkeeping purposes. Merchandise furnished at a company store may be considered as a "class" of facility and the records may show the cost of the operation of the store as a whole, or records showing the cost of furnishing the different kinds of merchandise may be maintained separately. Where cost records are kept for a "class" of facility rather than for each individual article furnished to employees, the records must also show the gross income derived from each such class of facility; e.g., gross rentals in the case of houses, total sales through the store or commissary, total receipts from sales of fuel, etc.

(1) Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost, as defined in Part 531 of this chapter, and shall contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount of accumulated depreciation on such assets. If the assets include merchandise held for sale to employees, the records should contain data from which the average net investment in inventory can be determined.

(2) No particular degree of itemization is prescribed. The amount of detail shown in these accounts should be consistent with good accounting practices, and should be sufficient to enable the Administrator or his representative to verify the nature of the expenditure and the amount by reference to the basic records which must be preserved pursuant to § 516.6(c)(3).

(b) If additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid semimonthly) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or (2) if the employee works in excess of the applicable maximum hours standard and (i) any addition to the wages paid are a part of his wages, or (ii) any deductions made are claimed as allowable deductions under sec. 3(m) of the Act, the employer shall maintain records showing those additions to or deductions from wages paid on a workweek basis. (For legal deductions not claimed under sec. 3(m) and which need not be maintained on a workweek basis, see §§ 531.38 to 531.40 of this chapter.)

(c) The records specified in this § 516.27 are not required with respect to an employee in any workweek in which he is not subject to the overtime provisions of the Act and receives not less than the applicable statutory minimum wage in cash for all hours worked in that workweek. (The application of section 3(m) of the Act in nonovertime weeks is discussed in § 531.36 of this chapter.)

§ 516.28 Tipped employees.

(a) Supplementary to the provisions of any section of the regulations in this part pertaining to the records to be kept with respect to tipped employees, every employer shall also maintain and preserve payroll or other records containing the following additional information and data with respect to each tipped employee whose wages are determined under section 3(m) of the Act:

(1) A symbol or letter placed on the pay records identifying each employee whose wage is determined in part by tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

(3) Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of 50 percent of the applicable statutory minimum wage). The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.

(4) Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.

(5) Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight time earnings for such hours.

§ 516.29 Employees under more than one minimum hourly rate.

(a) *Additional items required.* An employer of any employees subject to different minimum wage rates of pay who elects to pay less than an amount arrived at by applying the highest applicable minimum rate for all hours worked in any workweek, shall, in addition to any employee information and data required to be kept with respect to them by any applicable section of the regulations in this part maintain and preserve payroll or other records containing the following information and data with respect to each of those employees:

(1) The minimum rate of pay required to be paid for each different type of employment in which each such employee was engaged during the workweek (including, in Puerto Rico, the Virgin Islands, and American Samoa the applicable wage order rates),

(2) The basis on which wages are paid for each such different type of employment (such as "$1 each hour"; "$16 a day"; "$80 wk."; "2 cents per piece"; "$80 wk. plus 5 percent commission on sales over $800 wk."; etc.),

(3) The piece rate, if any, for each operation on each type of goods upon which the employee has worked under each such different applicable minimum rate of pay and the number of pieces worked upon at such piece rates (including, in Puerto Rico and the Virgin Islands, the lot number of each type of goods upon which the employee has worked),

(4) The total hours or fractions thereof worked that workweek by each such employee in employment covered by each such different applicable minimum rate, and

(5) The total wages due each such employee at straight time for the hours worked in each such different type of employment including any amounts earned in excess of the applicable minimum rate of pay.

(b) *Records of workers whose work cannot be segregated.* The provisions of paragraph (a) of this section shall not be construed to affect in any way the records to be kept, or compensation to be paid employees whose activities cannot be segregated and who are, therefore, not subject to different minimum rates of pay.

§ 516.30 Learners, apprentices, messengers, students, or handicapped workers employed under special certificates as provided in section 14 of the Act.

(a) *Items required.* With respect to persons employed as learners, apprentices, messengers or full-time students employed outside of their school hours in any retail or service establishment or handicapped workers at special minimum hourly rates under Special Certificates pursuant to section 14 of the Act, employers shall maintain and preserve records containing the same information and data required with respect to other employees employed in the same occupations.

(b) *Segregation or designation on payroll and use of identifying symbol.* In addition, each employer shall segregate on his payroll or pay records the names and required information and data with respect to those learners, apprentices, messengers, handicapped workers and students, employed under Special Certificates. A symbol or letter shall also be placed before each such name on the payroll or pay records indicating that that person is a "learner," "apprentice," "messenger," "student," or "handicapped worker," employed under a Special Certificate.

§ 516.31 Industrial homeworkers.

(a) *Definitions.* (1) "Industrial homeworker" and "homeworker," as used in this section, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(2) "Industrial homework," as used in this section, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(3) The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production" as used in this section is the same as in the Act.

(b) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each and every industrial homeworker employed by him (excepting those homeworkers to whom section 13(d) of the Act applies and those homeworkers in Puerto Rico to whom

Part 545 or Part 681 of this chapter apply, or in the Virgin Islands to whom Part 695 of this chapter applies):

(1) Name in full, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records. This shall be the same as that used for Social Security purposes,

(2) Home address, including zip code,

(3) Date of birth if under 19,

(4) With respect to each lot of work:

(i) Date on which work is given out to worker, or begun by worker, and amount of such work given out or begun,

(ii) Date on which work is turned in by worker, and amount of such work,

(iii) Kind of articles worked on and operations performed,

(iv) Piece rates paid,

(v) Hours worked on each lot of work turned in,

(vi) Wages paid for each lot of work turned in,

(vii) Deductions for Social Security taxes,

(viii) Date of wage payment and pay period covered by payment,

(5) With respect to each week:

(i) Hours worked each week,

(ii) Wages earned for each week at regular piece rates,

(iii) Extra pay due each week for overtime worked,

(iv) Total wages earned each week,

(v) Deductions for Social Security taxes,

(6) With respect to any agent, distributor, or contractor: The name and address of each such agent, distributor, or contractor through whom homework is distributed or collected and name and address of each homeworker to whom homework is distributed or from whom it is collected by each such agent, distributor, or contractor.

(7) Record of retroactive payment of wages. Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to section 16(c) of the Act, shall:

(i) Record and preserve, as an entry on his payroll or other pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(ii) Prepare a report of each such payment on the receipt form provided or authorized by the Wage and Hour Division, and (*a*) preserve a copy as part of his records, (*b*) deliver a copy to the employee, and (*c*) file the original, which shall evidence payment by the employer and receipt by the employee, with the Administrator or this authorized representative within 10 days after payment is made.

(c) *Homework handbook.* In addition to the information and data required in paragraph (b) of this section, a separate handbook (to be obtained by the employer from the Wage and Hour Division and supplied by him to each worker) shall be kept for each homeworker. The information required therein shall be entered by the employer or the person distributing or collecting homework on behalf of such employer each time work is given out to or received from a homeworker. Except for the time necessary for the making of entries by the employer, the handbook must remain in the possession of the homeworker until such time as the Wage and Hour Division may request it. Upon completion of the handbook (that is, no space remains for additional entries) or termination of the homeworker's services, the handbook shall be returned to the employer for preservation in accordance with the regulations in this part. A separate record and a separate handbook shall be kept for each person performing homework.

§ 516.32 Employees subject to the equal pay provisions of the Act, as set forth in section 6(d).

Every employer of employees subject to the equal pay provisions of the Act shall maintain and preserve all records required by the applicable sections of these regulations of this part and in addition, he shall preserve any records which he makes in the regular course of his business operation which relate to the payment of wages, wage rates, job evaluations, job descriptions, merit systems, seniority systems, collective bargaining agreements, description of pay practices or other matters which describe or explain the basis for payment of any wage differential to employees of the opposite sex in the same establishment, and which may be pertinent to a determination whether such differential is based on a factor other than sex.

§ 516.33 Employees employed in agriculture.

(a) No records, except as required under paragraph (f) of this section, need be maintained by an employer who did not use more than 500 man-days of agricultural labor in any quarter of the preceding calendar year, unless it can reasonably be anticipated that more than 500 man-days of agricultural labor (including agricultural workers supplied by crew leaders if the farmer has the power to direct, control or supervise the work, or to determine pay rates or method of payment) will be used in at least one calendar quarter of the current calendar year.

(b) If it can reasonably be anticipated that the employer will use more than 500 man-days of agricultural labor (including agricultural workers supplied by crew leaders if the farmer has the power to direct, control or supervise the work, or to determine pay rates or methods of payment, but not counting members of the employer's immediate family and hand harvest laborers as defined in section 13(a)(6)(B) of the Act), the employer shall maintain and preserve payroll records containing the following information with respect to each worker:

(1) Name in full. This shall be the same name as that used for Social Security purposes.

(2) Home address, including zip code.

(3) Sex and occupation in which employed (sex may be indicated by Mr., Mrs., or Miss).

(4) Symbols or other identifications separately designating those employees who are (i) members of the employer's immediate family as defined in section 13(a)(6)(B) of the Act, (ii) hand harvest laborers as defined in section 13(a)(6) (C) or (D), and (iii) employees principally engaged in the range production of livestock as defined in section 13(a)(6)(E).

(5) For each employee, other than members of the employer's immediate family and hand harvest laborers as defined in sections 13(a)(6) (B) and (C) of the Act, the number of man-days worked each week or each month. (A man-day is any day during which an employee does agricultural work for 1 hour or more.)

(c) For the entire year following a year in which the employer used more than 500 man-days of agricultural labor in any calendar quarter, exclusive of members of the employer's immediate family and hand harvest laborers as defined in sections 13(a)(6) (B) and (C) of the Act, he shall in addition to the records required by paragraph (b) of this section, maintain and preserve the following records with respect to every covered employee (other than members of the employer's immediate family, hand harvest laborers and livestock range employees as defined in sections 13(a)(6) (B), (C), (D), and (E) of the Act):

(1) Time of day and day of week on which the employee's workweek, or the workweek for all employees, begins.

(2) Basis on which wages are paid (such as "$1.30 an hour"; "$15 a day"; "piece work").

(3) Hours worked each workday and total hours worked each workweek.

(4) Total daily or weekly earnings.

(5) Total additions to or deductions from wages paid each pay period.

(6) Total wages paid each pay period.

(7) Date of payment and pay period covered by payment.

(d) In addition to other required items, the employer shall keep on file with respect to each hand harvest laborer as defined in section 13(a)(6)(C) of the Act for whom exemption is taken, or who is excluded from the 500 man-day test, a statement from each such employee showing the number of weeks he was employed in agriculture during the preceding calendar year.

(e) With respect to hand harvest laborers as defined in section 13(a)(6)(D), for whom exemption is taken, the employer shall maintain in addition to paragraphs (b) (1) through (5) of this section, the minor's date of birth and name of the minor's parent or person standing in place of his parent.

(f) Every employer (other than a parent or guardian standing in the place of a parent employing his own child or a child in his custody) who employs in agriculture any minor under 18 years of age on days when school is in session or on any day if the minor is employed in an occupation found to be hazardous by the Secretary shall maintain and preserve records containing the following data with respect to each and every such minor so employed:

(1) Name in full.

(2) Place where minor lives while employed. If the minor's permanent address is elsewhere, give both addresses.

(3) Date of birth.

(g) Where a farmer and a bona fide independent contractor or crew leader are joint employers of agricultural laborers, each employer is responsible for maintaining and preserving the records required by this section. Duplicate records of hours and earnings are not required. The requirements will be considered met if the employer who actually pays the employees maintains and preserves the records specified in § 516.33(c).

(52 Stat. 1060, as amended; 29 U.S.C. 201 et seq.)

[32 FR 9551, July 1, 1967, as amended at 38 FR 27520, Oct. 4, 1973]

§ 516.34 Domestic service employees.

(a) With respect to any person employed as a domestic service employee who is not exempt under section 13(a)(15) of the Act, the employer of such person shall maintain and preserve records containing for each such person the following:

(1) Name in full;

(2) Social security number;

(3) Address in full, including zip code;

(4) Total hours worked each week by such employee for the employer;

(5) Total cash wages paid each week to such employee by the employer;

(6) Weekly sums claimed by the employer for board, lodging or other facilities; and

(7) Extra pay for weekly hours worked in excess of 40 by such employee for the employer.

(b) No particular form of records is required, so long as the above information is recorded and the record is maintained and preserved for a period of 3 years.

(c) Where an employee works on a fixed schedule, the employer may maintain the schedule of daily and weekly hours the employee normally works, and (1) indicate by check mark, statement or other method that such hours were actually worked, and (2) when more or less than the scheduled hours are worked, show the exact number of hours worked.

[40 FR 7405, Feb. 20, 1975]

PART 519—EMPLOYMENT OF FULL-TIME STUDENTS AT SUBMINIMUM WAGES

Subpart A—Retail or Service Establishments, and Agriculture

Sec.

519.1 Applicability of the regulations in this subpart.
519.2 Definitions.
519.3 Application for a full-time student certificate.
519.4 Procedure for action upon an application.
519.5 Conditions governing issuance of full-time student certificates.
519.6 Terms and conditions of employment under full-time student certificates and under temporary authorization.
519.7 Records to be kept.
519.8 Amendment or replacement of a full-time student certificate.
519.9 Reconsideration and review.
519.10 Amendment or revocation of the regulations in this subpart.

Subpart B—Institutions of Higher Education

519.11 Applicability of the regulations in this subpart.
519.12 Definitions.
519.13 Application for a full-time student certificate.
519.14 Procedure for action upon an application.
519.15 Conditions governing issuance of full-time student certificates.
519.16 Terms and conditions of employment under full-time student certificates and under temporary authorization.
519.17 Records to be kept.
519.18 Amendment or replacement of a full-time student certificate.
519.19 Reconsideration and review.

Sec.
519.20 Amendment or revocation of the regulations in this subpart.

AUTHORITY: Secs. 11 and 14, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501 and 602, 80 Stat. 843, 844 (29 U.S.C. 211, 214).

SOURCE: 40 FR 6329, Feb. 11, 1975, unless otherwise noted.

Subpart A—Retail or Service Establishments, and Agriculture

§ 519.1 Applicability of the regulations in this subpart.

(a) *Statutory provisions.* Under section 14 of the Fair Labor Standards Act of 1938, as amended, and the authority and responsibility delegated to him/her by the Secretary of Labor (36 FR 8755) and by the Assistant Secretary for Employment Standards (39 FR 33841) the Administrator of the Wage and Hour Division is authorized and directed, to the extent necessary in order to prevent curtailment of opportunities for employment, to provide by regulation or order for the employment, under certificates, of full-time students in retail or service establishments, or in agriculture. That section contains provisions requiring a wage rate in such certificates of not less than 85 percent of the minimum wage applicable under section 6 of the Act, limiting weekly hours of employment, stipulating compliance with the applicable child-labor standards, and safeguarding against the reduction of the full-time employment opportunities of employees other than full-time students employed under certificates.

(b) *Source of limitations.* Some of the limitations in this subpart are specifically required in section 14(b) of the Act. The other limitations implement the provisions in that section relating to employment opportunities, i.e., the "extent necessary to prevent curtailment of opportunities for employment" and the avoidance of a "substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized" under section 14(b) is applicable.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.2 Definitions.

(a) *Full-time students.* A "full-time student" for the purpose of this subpart is defined as a student who receives primarily daytime instruction at the physical location of a bona fide educational institution, in accordance with the institution's accepted definition of a full-time student. A full-time student retains that status during the student's Christmas, summer and other vacations. An individual who was such a student immediately prior to vacation will be presumed not to have discontinued such status during vacation if local law requires his/her attendance at the end of the vacation. In the absence of such requirement his/her status during vacation will be governed by his/her intention as last communicated to his/her employer. The phrase in section 14(b) of the statute "regardless of age but in compliance with applicable child-labor laws," among other things, restricts the employment in a retail or service establishment to full-time students who are at least 14 years of age because of the application of section 3(1) of the Act. There is a minimum age requirement of 16 years in agriculture for employment during school hours and in any occupation declared hazardous by the Secretary of Labor (Subpart E-1 of Part 570 of this Title.) In addition, there is a minimum age restriction of 14 years generally for employment in agriculture of a full-time student outside school hours for the school district where such employee is living while so employed, except (1) minors 12 or 13 years of age may be employed with written parental or guardian consent or they may work on farms where their parents or guardians are employed, and (2) minors under 12 may work on farms owned or operated by their parents or with parental or guardian consent on farms whose employees are exempt from section 6 by section 13 (a)(6)(A) of the Act.

(b) *Bona fide educational institution.* A "bona fide educational institution" is ordinarily an accredited institution. However, a school which is not accredited may be considered a "bona fide educational institution" in exceptional circumstances, such as when the school is too recently established to have received accreditation.

(c) *Retail or service establishment.* "Retail or service establishment" means a retail or service establishment as defined in section 13(a)(2) of the Fair Labor Standards Act. The statutory definition is interpreted in Part 779 of this chapter.

(d) *Agriculture.* "Agriculture" means agriculture as defined in section 3(f) of the Fair Labor Standards Act. The statutory definition is interpreted in Part 780 of this chapter.

(e) *Student hours of employment.* "Student hours of employment" means hours during which students are employed under full-time student certificates issued under this part and is distinguished from "hours of employment of students".

(f) *Employer.* Section 519.4 permits an agricultural or retail or service establishment employer to employ not more than six full-time students at subminimum wages on forwarding an application but before certification. For this purpose, the term "employer" looks to the highest structure of ownership or control, and hence may be more than a single retail or service establishment or farm, e.g., the controlling conglomerate or enterprise would be the "employer". With respect to public employers who operate retail or service establishments (see 29 CFR Part 779), the "employer" means the highest structure of control such as the State, municipality, county or other political subdivision.

[40 FR 6329, Feb. 11, 1975, as amended at 42 FR 58745, Nov. 11, 1977; 43 FR 29000, July 5, 1978]

§ 519.3 Application for a full-time student certificate.

(a) Whenever the employment of full-time students working outside of school hours in agriculture or in a retail or service establishment at wages lower than the minimum applicable under section 6 of the Fair Labor Standards Act is believed to be necessary to prevent curtailment of opportunities for employment and employment of them will not create a substantial probability of reducing the full-time employment opportunities of the other workers, an application for a certificate may be filed by their employer with the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota, and South Dakota; the Salt Lake City, Utah area Office for Montana, Utah, and Wyoming; and the Caribbean Office for the area it covers). Such application shall be signed by an authorized representative of the employer.

(b) The application must be filed in duplicate on official forms or exact copies thereof. The forms are available at the offices mentioned in paragraph (a) of this section. The application must contain the information as to the type of products sold or services rendered by the establishment, hours of employment during the preceding twelve-month period or data from previous certificates (or applications) as pertinent to the application, and other information for which request is made on the form.

(c) Separate application must be made for each farm or establishment in which authority to employ full-time students at subminimum wage rates is sought.

(d) Application for renewal of a certificate shall be made either on the same type of form as is used for a new application or on an alternate official form. No certificate in effect shall expire until action on such an application shall have been finally determined, provided that such application has been properly executed, and is received by the office specified in paragraph (a) of this section not less than 15 nor more than 30 days prior to the expiration date. A properly executed application is one which fully and accurately contains the information required on the form, and the required certification by an authorized representative of the employer.

§ 519.4 Procedure for action upon an application.

(a) Under certain conditions, an agricultural or retail or service establishment employer may obtain temporary authorization to employ full-time students at subminimum wages. These conditions are: (1) Attestation by the employer that he/she will employ no more than six full-time students at subminimum wages on any workday and that the employment of such students will not reduce the full-time employment opportunities of other persons, and (2) forwarding a properly completed application to the Wage and Hour Division not later than the start of such employment, and (3) posting a notice of such filing at the place(s) specified in paragraph (a) of § 519.6 of this subpart, and (4) compliance during the temporary authorization period with the requirements set forth in paragraphs (b) and (j) through (o) of § 519.6 of this subpart.

(b) Temporary authorization under the conditions set forth in paragraph (a) of this section is effective from the date the application is forwarded to the Wage and Hour Division in conformance with § 519.3 of this subpart. This authorization shall continue in effect for one year from the date of forwarding of the application unless, within 30 days the Administrator or his/her authorized representative denies the application, issues a certificate with modified terms and conditions, or expressly extends the 30-day period of review.

(c) Upon receipt of an application for a certificate, the officer authorized to act upon such application shall issue a certificate if the terms and conditions specified in this subpart are satisfied. To the extent he/she deems appropriate, the authorized officer may provide an opportunity to other interested persons to present data, views, or argument on the application prior to granting or denying a certificate.

(d) Until April 30, 1976, if a certificate is issued, there shall be published in the FEDERAL REGISTER a general statement of the terms of such certificate together with a notice that, pursuant to § 519.9, for 45 days following such publication any interested person may file a written request for reconsideration or review. Thereafter, applications and certificates will be available for examination in accordance with applicable regulations in Washington, D. C., and in the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota, and South Dakota; the Salt Lake City, Utah Area Office for Montana, Utah, and Wyoming; and the Caribbean Office for the area it covers) for establishments in its area. A period of 60 days will be provided after certificate issuance during which any interested person may file a written request for reconsideration or review.

(e) If a certificate is denied, notice of such denial shall be sent to the employer, stating the reason or reasons for the denial. Such denial shall be without prejudice to the filing of any subsequent application.

[40 FR 6329, Feb. 11, 1975, as amended at 42 FR 58745, Nov. 11, 1977]

§ 519.5 Conditions governing issuance of full-time student certificates.

Certificates authorizing the employment of full-time students at subminimum wage rates shall not be issued unless the following conditions are met:

(a) Full-time students are available for employment at subminimum rates; the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment.

(b) The employment of more than six full-time students by an employer will not create a substantial probability of reducing the full-time employment opportunities for persons other than those employed under such certificates.

(c) Abnormal labor conditions such as a strike or lockout do not exist at the farm or establishment for which a full-time student certificate is requested.

(d) The data given on the application are accurate and based on available records.

(e) The farms or establishments on whose experience the applicant relies meet the requirements of paragraph (h) of § 519.6.

(f) There are no serious outstanding violations of the provisions of a full-time student certificate previously issued to the employer, nor have there been any serious violations of the Fair Labor Standards Act (including Child-Labor Regulation No. 3 and the Hazardous Occupations Orders published in Part 570 of this Chapter) which provide reasonable grounds to conclude that the terms of a certificate may not be compiled with, if issued.

(g) The subminimum wage rate(s) proposed to be paid full-time students under temporary authorization or under certificate is not less than 85 percent of the minimum wage applicable under section 6 of the Act.

(h) Certificates will not be issued where such issuance will result in a reduction of the wage rate paid to a current employee, including current student employees.

[40 FR 6329, Feb. 11, 1975, as amended at 42 FR 58745, Nov. 11, 1977]

§ 519.6 Terms and conditions of employment under full-time student certificates and under temporary authorization.

(a) A full-time student certificate will not be issued for a period longer than 1 year, nor will it be issued retroactively. It shall specify its effective and expiration dates. A copy of the certificate shall be posted during its effective period in a conspicuous place or places in the establishment or at the farm readily visable to all employees, for example, adjacent to the time clock or on the bulletin board used for notices to the employees. If temporary authorization is in effect under paragraph (a) of § 519.4 of this subpart, a notice thereof shall be similary posted during the effective period of such authorization.

(b) Full-time students may not be employed under a certificate at less than 85 percent of the minimum wage applicable under section 6 of the Act.

(c) For retail or service establishment employers or agricultural employers, the allowable extent of full-time student employment under certificates varies depending on whether: (1) The employer proposes to employ no more than six full-time students at subminimum wages on any workday, (2) the applicant requests authority for not more than 10 percent of the total hours of all employees during any month, or (3) the applicant requests authority for more than 10 percent of the total hours during any month. (For agricultural employers, the month of full-time student certificated employment may vary somewhat from the month in a previous year on which the certificate is based, depending on seasonal factors.)

(d) *Retail or service establishment employers or agricultural employers requesting authorization to employ not more than six full-time students at subminimum wages on any workday.* An application from such an applicant provides temporary authorization for the employment of full-time students at subminimum wages: *Provided,* The conditions set forth in paragraph (a) of § 519.4 of this subpart are met. Upon review of the application by the Administration or his/her authorized representative, the extent of the temporary authority may be modified.

(e) *Applicants requesting authorization for not more than 10 percent of the total hours of all employees during any month.* For such an applicant, certificates may authorize the employment of full-time student at subminimum wages for up to 10 percent of the total hours of all employees during any month, regardless of past practice of employing students. (Note: An establishment which has not previously held a certificate may be authorized 10 percent of the total hours of all employees during any month. Applicants requesting authority under this paragraph need not refer to paragraphs (f), (g), or (h) of this section.)

(f) *Applicants reguesting authorization for more than 10 percent of the total monthly hours of all employees during any month with records of hours of employment of students and coverage by the Act prior to May 1974.* For such an applicant, certificates may not authorize full-time student employment at subminimum wages in excess of the highest ratio under any of these three formulas: (1) The proportion of student hours of employment (i.e., of full-time students under certificates) to total hours of all employees for the corresponding month of the preceding twelve-month period; (2) the maximum proportion of student hours of employment to total hours of all employees (in any corresponding month), applicable to the issuance of full-time student certificates before May 1974; or (3) 10 percent of the total hours of all employees, during any month. (Note: An establishment which is entitled to monthly allowances ranging from 5 to 20 percent may be authorized 10 percent for those months which were less than 10 percent and retain the higher allowances for those months above 10 percent.)

(g) *Applicants requesting authorization for more than 10 percent of the total hours of all employees during any month with records of hours of employment of students and new coverage under the 1974 Amendments.* For such an applicant, the highest permissible allowance under a certificate during any month is the highest ratio under any of these three formulas: (1) The proportion of hours of employment of full-time students to total hours of all employees during the corresponding month from May 1973 through April 1974; (2) the proportion of student hours of employment (i.e., of hours of full-time students under certificates) to total hours of all employees during the corresponding month of the preceding twelve-month period (an alternative which is not applicable to all months of the year until 12 months after May 1, 1974); or (3) 10 percent of the total hours of all employees, during any month. (See notes under paragraphs (e) and (f) of this section.)

(h) *Applicants requesting authorization for more than 10 percent of the total hours of all employees during any month without records of student hours worked.* For such an applicant, the permissible proportion under certificate of full-time student hours at subminimum wages to total hours of all employees is based on the "practice" during the preceding twelve-month period of: (1) Similar establishments of the same employer in the same general metropolitan areas in which such establishment is located: (2) similar establishments in the same or nearby communities if such establishment is not in a metropolitan area; or (3) other establishments of the same general character operating in the community or the nearest comparable community. ("Practice" means either the certificate allowances or the proportion between the actual student hours of employment to the total hours of all employees.)

(i) An overestimate of total hours of employment of all employees for a current month resulting in the employment of the full-time students in excess of the hours authorized in paragraph (e), (f), (g), or (h) of this section may be corrected by compensating them for the difference between the subminimum wages actually paid and the applicable minimum under section 6 of the Act for the excess hours. Similarly, if an agricultural employer or a retail or service establishment employer has authorization to employ no more than six full-time students at subminimum wages on any workday but exceeds that number, the excess may be corrected by compensating the additional full-time students for the difference between the subminimum wages actually paid and the applicable minimum under section 6 of the Act. This additional compensation shall be paid on the regular payday next after the end of the period.

(j) Full-time students shall not be permitted to work at subminimum wages for more than 8 hours a day, nor for more than 40 hours a week when school is not in session, nor more than 20 hours a week when school is in session (apart from a full-time student's summer vacation), except that when a full-day school holiday occurs on a day when the establishment is open for business, the weekly limitation on the maximum number of hours which may be worked shall be increased by 8 hours for each such holiday but in no event shall the 40-hour limitation be exceeded. (Note: School is considered to be in session for a student attending summer school.) Whenever a full-time student is employed for more than 20 hours in any workweek in conformance with this paragraph, the employer shall note in his/her payroll records that school was not in session during all or part of that workweek or the student was in his/her summer vacation.

(k) Neither oppressive child labor as defined in section 3(l) of the Act and regulations issued under the Act nor any other employment in violation of a Federal, State or local child labor law or ordinance shall come within the terms of any certificate issued under this subpart.

(l) Full-time students shall be employed at subminimum wages under this subpart only outside of their school hours, i.e., only outside of the scheduled hours of instruction of the individual student, or, in the case of agriculture, only outside of school hours for the school district where the employee is living while so employed, if the employee is under 16 years of age.

(m) No full-time student shall be hired under a full-time student certificate while abnormal labor conditions, such as a strike or lockout, exist at the establishment or farm.

(n) No provision of any full-time student certificate shall excuse noncompliance with higher standards applicable to full-time students which may be established under the Walsh-Healey Public Contracts Act or any other Federal law, State law, local ordinance, or union or other agreement. Thus, certificates issued under this law have no application to employment under the Service Contract Act.

(o) No full-time student certificate shall apply to any employee to whom a certificate issued under section 14 (a) or (c) of the Act has application.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975, as amended at 42 FR 58745, Nov. 11, 1977]

§ 519.7 Records to be kept.

(a) The employer shall designate each worker employed as a full-time student under a full-time student certificate at subminimum wages, as provided under Part 516 of this chapter.

(b) (1) In addition to the records required under Part 516 of this chapter and this subpart, the employer shall keep the records specified in paragraph (b) (2) and (3) of this section specifically relating to full-time students employed at subminimum wages.

(2) The employer shall obtain at the time of hiring and keep in his records information from the school attended that the employee receives primarily daytime instruction at the physical location of the school in accordance with the school's accepted definition of a full-time student. During a period between attendance at different schools not longer than the usual summer vacation, a certificate from the school next to be attended that the student has been accepted as a full-time student will satisfy the requirements of this paragraph (b)(2).

(3) The employer operating any farm or retail or service establishment shall maintain records of the monthly hours of employment of full-time students at subminimum wages and of the total hours of employment during the month of all employees in the establishment except for those employed in agriculture who come within one of the other exemptions from the minimum wage provisions of the Act.

(c) The records required in this section, including a copy of any full-time student certificate issued, shall be kept for a period of 3 years at the place and made available for inspection, both as provided in Part 516 of this chapter.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.8 Amendment or replacement of a full-time student certificate.

In the absence of an objection by the employer (which may be resolved in the manner provided in Part 528 of this chapter), the authorized officer upon his/her own motion may amend the provisions of a certificate when it is necessary by reason of the amendment of these regulations, or may withdraw a certificate and issue a replacement certificate when necessary to correct omissions or apparent defects in the original certificate.

§ 519.9 Reconsideration and review.

(a) Within 15 days after being informed of a denial of an application for a full-time student certificate or within 45 days after FEDERAL REGISTER publication of a statement of the terms of the certificate granted (subsequent to April 30, 1976, within 60 days after a certificate is granted), any person aggrieved by the action of an authorized officer in denying or granting a certificate may: (1) File a written request for reconsideration thereof by the authorized officer who made the decision in the first instance, or (2) file with the Administrator a written request for review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision and a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the reconsideration determination of an authorized officer may, within 15 days after such determination, file with the Administrator a written request for review.

(d) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(e) If a request for reconsideration or review is granted, the authorized officer or the Administrator may, to the extent he/she deems it appropriate, afford other interested persons an opportunity to present data, views, or argument.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.10 Amendment or revocation of the regulations in this subpart.

The Administrator may at any time upon his/her motion or upon written request of any interested person or persons setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present data, views, or argument, amend or revoke any of the regulations of this subpart.

Subpart B—Institutions of Higher Education

§ 519.11 Applicability of the regulations in this subpart.

(a) *Statutory provisions.* Under section 14 of the Fair Labor Standards Act of 1938, as amended, and the authority and responsibility delegated to him/her by the Secetary of Labor (36 FR 8755) and by the Assistant Secretary for Employment Standards (39 FR 33841), the Administrator of the Wage and Hour Division is authorized and directed, to the extent necessary in order to prevent curtailment of opportunities for employment, to provide by regulation or order for the employment, under certificates, of full-time students in institutions of higher education. That section contains provisions requiring a wage rate in such certificates of not less than 85 percent of the minimum wage applicable under section 6 of the Act, limiting weekly hours of employment, stipulating compliance with the applicable child-labor standards, and safeguarding against the reduction of the full-time employment opportunities of employees other than full-time students employed under certificates.

(b) *Source of limitations.* Some of the limitations expressed in this subpart are specifically required in section 14(b) of the Act. The other limitations implement the provisions relating to employment opportunities, i.e., the "extent necessary in order to prevent curtailment of opportunities for employment" and the requirement that the regulations shall "prescribe standards and requirements to insure that this paragraph will not create a substantial probability of reducing the full-time employment opportunities of persons other than those to whom the minimum wage rate authorized by" section 14(b) of the Act is applicable.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.12 Definitions.

(a) *Full-time students.* A "full-time student" for the purpose of this subpart is defined as one who meets the accepted definition of a full-time student of the institution of higher education which employs him/her. A full-time student retains that status during the student's Christmas, summer and other vacations, even when a student is taking one or more courses during his/her summer or other vacation. The phrase in section 14(b) of the statute "regardless of age but in compliance with applicable child labor laws", among other things restricts the employment in an institution of higher education to full-time students who are at least 14 years of age because of the application of section 3(1) of the Act.

(b) *Institution of higher education.* An "institution of higher education" is an institution above the secondary level, such as a college or university, a junior college, or a professional school of engineering, law, library science, social work, etc. It is one that is recognized by a national accrediting agency or association as determined by the U.S. Commissioner of Education. Generally, an institution of higher education: (1) Admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate; and (2) is legally authorized within a State to provide a program of education beyond high school; and (3) provides an educational program for which it normally awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semi-professional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles of knowledge.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.13 Application for a full-time student certificate.

(a) Whenever the employment of its full-time students working in an institution at wages lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act is believed to be necessary to prevent curtailment of opportunities for employment and employment of them will not create a substantial probability of reducing the full-time employment opportunities of other workers, an application for a certificate may be filed by their employer with the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota and South Dakota; the Salt Lake City, Utah Area Office for Montana, Utah and Wyoming; and the Caribbean Office for the area it covers). Such an application shall be signed by an authorized representative of the employer.

(b) The application provided for under § 519.14 must be filed in duplicate on official forms or exact copies thereof. The forms are available at the offices mentioned in paragraph (a) of this section. The application must contain the information on numbers of full-time students and full-time employees (other than full-time students), minimum full-time student wages, and other information for which request is made on the form.

(c) Separate application must be made for each campus of an institution of higher education for which authority to employ full-time students at subminimum wage rates is sought.

(d) Application for renewal of a certificate shall be made on the same type of form as is used for a new application. No certificate in effect shall expire until action on such an application shall have been finally determined, provided that such application has been properly executed, and is received by the office specified in paragraph (a) of this section not less than 15 nor more than 30 days prior to the expiration date. A properly executed application is one which fully and accurately contains the information required on the form, and the required certification by an authorized representative of the employer.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.14 Procedure for action upon an application.

(a) Under certain conditions, an institution of higher education has temporary authorization to employ full-time students at subminimum wages. These conditions are: (1) Absence of an effective finding by the Secretary that the institution has been employing full-time students under certificates in violation of the requirements of section 14(b)(3) of the Act or of these regulations; and (2) forwarding of a properly completed application to the Wage and Hour Division not later than the start of employment of full-time students at subminimum wages; and (3) posting a notice of such filing at the place(s) specified in paragraph (a) of § 519.16 of this subpart; and (4) compliance during the temporary authorization period with the requirements set forth in paragraphs (b) and (e) through (j) of § 519.16 of this subpart.

(b) Temporary authorization under the conditions set forth in paragraph (a) of this section is effective from the date the application is forwarded to the Wage and Hour Division in conformance with § 519.13 of this subpart. This authorization shall continue in effect for one year from the date of forwarding of the application unless, within 30 days, the Administrator or his/her authorized representative denies the application, issues a certificate with modified terms and conditions, or expressly extends the 30-day period of review.

(c) Upon receipt of an application for a certificate, the officer authorized to act upon such application shall issue a certificate if the terms and conditions specified in this subpart are satisfied. To the extent he/she deems appropriate, the authorized officer may provide an opportunity to other interested persons to present data, views, or argument on the application prior to granting or denying a certificate.

(d) Until April 30, 1976, if a certificate is issued there shall be published in the FEDERAL REGISTER a general statement of the terms of such certificate together with a notice that, pursuant to § 519.19, for 45 days following such publication any interested person may file a written request for reconsideration or review. Thereafter, applications and certificates will be available for examination in accordance with applicable regulations in Washington, D.C., and in the appropriate Regional Office of the Wage and Hour Division (or the Denver, Colorado Area Office for Colorado, North Dakota, and South Dakota; the Salt Lake City, Utah Area Office for Montana, Utah, and Wyoming; and the Caribbean Office for the area it covers) for institutions of higher education in its area. A period of 60 days will be provided after certificate issuance during which any interested person may file a written request for reconsideration or review.

(e) If a certificate is denied, notice of such denial shall be sent to the employer, stating the reason or reasons for the denial. Such denial shall be without prejudice to the filing of any subsequent application.

§ 519.15 Conditions governing issuance of full-time student certificates.

Certificates authorizing the employment of full-time students at subminimum wage rates shall not be issued unless the following conditions are met:

(a) Full-time students are available for employment at subminimum rates; the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment.

(b) The employment of full-time students will not create a substantial probability of reducing the full-time employment opportunities for persons other than those employed under such certificates.

(c) Abnormal labor conditions such as a strike or lockout do not exist in the units of the campus for which a full-time student certificate is requested.

(d) The data given on the application are accurate and based on available records.

(e) There are no serious outstanding violations of the provisions of a full-time student certificate previously issued to the employer, nor have there been any serious violations of the Fair Labor Standards Act (including Child-Labor Regulation No. 3 and the Hazardous Occupations Orders published in Part 570 of this chapter) which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

(f) The subminimum wage rate(s) proposed to be paid full-time students under temporary authorization or under certificate is not less than 85 percent of the minimum wage applicable under section 6 of the Act.

(g) Full-time students are not to be employed by an institution of higher education at subminimum wages under this subpart in unrelated trades or businesses as defined and applied under sections 511 through 515 of the Internal Revenue Code, such as apartment houses, stores, or other businesses not primarily catering to the students of the institution.

(h) Certificates will not be issued where such issuance will result in a reduction of the wage rate paid to a current employee, including current student employees.

§ 519.16 Terms and conditions of employment under full-time student certificates and under temporary authorization.

(a) A full-time student certificate will not be issued for a period longer than 1 year, nor will it be issued retroactively. It shall specify its effective and expiration dates. A copy of the certificate shall be posted during its effective period in a conspicuous place or places in the institution of higher education readily visible to all employees, for example, adjacent to the time clock or on the bulletin board used for notices to the employees. If temporary authorization is in effect under paragraph (a) of § 519.14, a notice thereof shall be similarly posted during the effective period of such authorization.

(b) Full-time students may not be employed under a certificate at less than 85 percent of the minimum wage applicable under section 6 of the Act.

(c) An institution of higher education shall not employ full-time students at subminimum wages under this subpart in unrelated trades or businesses as defined and applied under sections 511 through 515 of the Internal Revenue Code, such as apartment houses, stores, or other businesses not primarily catering to the students of the institution.

(d) An institution of higher education subject to a finding by the Secretary that it is in violation of the requirements of section 14(b)(3) of the Act or of this subpart must be issued a full-time student certificate before it can employ full-time students at wages below those required by section 6 of the Act. The Administrator or his/her authorized representative will not issue a full-time student certificate to such an institution without adequate assurances and safeguards to insure that the violations found by the Secretary will not continue.

(e) Full-time students shall not be permitted to work at subminimum wages for more than 8 hours a day, nor for more than 40 hours a week when school is not in session, nor more than 20 hours a week when school is in session (apart from a full-time student's summer vacation), except that when a full-day school holiday occurs the weekly limitation on the maximum hours which may be worked shall be increased by 8 hours for each such holiday but in no event shall the 40-hour limitation be exceeded. (Note: School is considered to be in session for a student taking one or more courses during a summer or other vacation.)

Whenever a full-time student is employed for more than 20 hours in any workweek in conformance with this paragraph, the employer shall note in his/her payroll that school was not in session during all or part of that workweek or the student was in his/her summer vacation.

(f) Neither oppressive child labor as defined in section 3(1) of the Act and regulations issued under the Act nor any other employment in violation of a Federal, State or local child labor law or ordinance shall come within the terms of any certificate issued under this subpart.

(g) Full-time students shall be employed at subminimum wages under this subpart only outside of their school hours, i.e., only outside of the scheduled hours of instruction of the individual full-time student.

(h) No full-time student shall be hired under a full-time student certificate for work in a unit or units of the campus where abnormal labor conditions, such as a strike or lockout, exist.

(i) No provision of any full-time student certificate shall excuse noncompliance with higher standards applicable to full-time students which may be established under the Walsh-Healey Public Contracts Act or any other Federal law, State law, local ordinance, or union or other agreement. Thus, certificates issued under this subpart have no application to employment under the Service Contract Act.

(j) No full-time student certificate shall apply to any employee to whom a certificate issued under section 14(a) or (c) of the Act has application.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.17 Records to be kept.

(a) The employer shall designate each worker employed as a full-time student under a full-time student certificate at subminimum wages, as provided under Part 516 of this chapter.

(b) (1) In addition to the records required under Part 516 of this chapter and this subpart, the employer shall keep the records specified in paragraphs (b) (2) and (3) of this section specifically relating to full-time students employed at subminimum wages.

(2) The institution shall obtain at the time of hiring and keep in its records information that the employee is its full-time student at the physical location of the institution in accordance with its accepted definition of a full-time student. During a period between attendance at different schools not longer than the usual summer vacation, the acceptance by the institution of the full-time student for its next term will satisfy the requirements of (b)(2) of this section.

(3) An institution of higher education shall maintain records showing the total number of all full-time students of the type defined in § 519.12(a) employed at the campus of the institution at less than the minimum wage otherwise applicable under the Act, and the total number of all employees at the campus to whom the minimum wage provision of the Act applies.

(c) The records required in this section, including a copy of any full-time student certificate issued, shall be kept for a period of 3 years at the place and made available for inspection, both as provided in Part 516 of this chapter.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.18 Amendment or replacement of a full-time student certificate.

In the absence of an objection by the employer (which may be resolved in the manner provided in Part 528 of this chapter) the authorized officer upon his/her own motion may amend the provisions of a certificate when it is necessary by reason of the amendment of these regulations, or may withdraw a certificate and issue a replacement certificate when necessary to correct omissions or apparent defects in the original certificates.

§ 519.19 Reconsideration and review.

(a) Within 15 days after being informed of a denial of an application for a full-time student certificate or within 45 days after Federal Register publication of a statement of the terms of the certificate granted, (subsequent to April 30, 1976, within 60 days after a certificate is granted), any person aggrieved by the action of an authorized officer in denying or granting a certificate may: (1) File a written request for reconsideration thereof by the authorized officer who made the decision in the first instance, or (2) file with the Administrator a written request for review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision and a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the reconsideration of an authorized officer may, within 15 days after such determination, file with the Administrator a written request for review.

(d) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(e) If a request for reconsideration or review is granted, the authorized officer or the Administrator may, to the extent he/she deems it appropriate, afford other interested persons an opportunity to present data, views, or argument.

[40 FR 6329, Feb. 11, 1975; 40 FR 22546, May 23, 1975]

§ 519.20 Amendment or revocation of the regulations in this subpart.

The Administrator may at any time upon his/her own motion or upon written request of any interested person or persons setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present data, views, or argument, amend or revoke any of the regulations of this subpart.

PART 520—EMPLOYMENT OF STUDENT LEARNERS

Sec.

520.1 Applicability of the regulations contained in this part.
520.2 Definitions.
520.3 Application for a special student-learner certificate.
520.4 Procedure for action upon application.
520.5 Conditions necessary for favorable review.
520.6 Terms and conditions of employment under special student-learner certificates.
520.7 Employment records to be kept.
520.8 Duration of certificates.
520.9 Compliance with established standards.
520.10 Reconsideration and review.
520.11 Amendment to the regulations in this part.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214.

§ 520.1 Applicability of the regulations contained in this part.

The regulations contained in this part are issued in accordance with section 14 of the Fair Labor Standards Act of 1938, as amended, to provide for the employment under special certificates of student-learners at wages lower than the minimum wage applicable under section 6 of the act. Such certificates shall be subject to the terms and conditions hereinafter set forth.

[18 FR 3290, June 10, 1953]

§ 520.2 Definitions.

As used in the regulations contained in this part:

(a) A "student-learner" is a student who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a bona fide vocational training program.

(b) A "bona fide vocational training program" is one authorized and approved by a State board of vocational education or other recognized educational body and provides for part-time employment training which may be scheduled for a part of the work day or work week, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related industrial information given as a regular part of the student-learner's course by an accredited school, college, or university.

[18 FR 3290, June 10, 1953]

§ 520.3 Application for a special student-learner certificate.

(a) Whenever the employment of a student-learner at wages lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act of 1938, as amended, is believed necessary to prevent curtailment of opportunities for employment, an application for a special certificate authorizing the employment of such student-learner at subminimum wages shall be filed in duplicate by the employer with the authorized representative of the Administrator at the appropriate Regional or Caribbean Office of the Wage and Hour Division, U.S. Department of Labor.

(b) Application must be made on the official form furnished by the Division and must be signed by the employer, the appropriate school official and the student-learner. The application must contain all information required by such form, including among other things, a statement clearly outlining the vocational training program and showing, particularly, the processes in which the student-learner will be engaged when in training on the job; a statement clearly outlining the school instruction directly related to the job; the total number of workers employed in the establishment; the number and hourly wage rate of experienced workers employed in the occupation in which the student-learner is to be trained; the hourly wage rate or progressive wage schedule which the employer proposes to pay the student-learner; data regarding the age of the student-learner; the period of employment training at subminimum wages; the number of hours of employment training a week; the number of hours of school instruction a week; and a certification by the appropriate school official that the student named therein will be receiving instruction in an accredited school, college or university and will be employed pursuant to a bona fide vocational training program, as defined in § 520.2(b).

(c) The certification by the appropriate school official must satisfy the following conditions:

(1) The application must be properly executed in conformance with § 520.3.

(2) The employment training must conform with the provisions of § 520.5 (a), (c), (d), and (g) and paragraphs (a) and (c) of § 520.6.

(3) The occupation must not be one for which a student-learner application was previously submitted by the employer and a special certificate was denied by the Administrator or his authorized representative.

[35 FR 13884, Sept. 2, 1970]

§ 520.4 Procedure for action upon application.

(a) The certification by the appropriate school official on an application for a special student-learner certificate authorizing the employment of a student-learner at subminimum wages (see § 520.3(b)) shall constitute a temporary authorization for the employment of a student-learner at wages lower than the minimum wage applicable under section 6 of the act, effective from the date such application is forwarded to the Division in conformance with § 520.3 and, at the end of 30 days, shall become the permanent special student-learner certificate unless, after review, the Administrator or his authorized representative denies the application, issues a certificate with modified terms and conditions, or expressly extends the period of review.

(b) Upon receipt of an application for the employment of a student-learner, the Administrator or his authorized representative shall review the application for compliance with this part. If an application is to be denied, notification of denial should be made to the appropriate school official, the employer, and the student within the 30 days following the date such application was forwarded to the Division, unless additional time for review is considered necessary or appropriate, and in which case the appropriate school offical, the employer, and the student shall be so notified. To the extent feasible, the Administrator or his authorized representative shall provide an opportunity to other interested persons to present data and views on the application before denying a special student-learner certificate.

(c) Whenever a notification of denial is mailed to the employer, such denial shall be without prejudice to any subsequent application, except under the circumstances referred to in § 520.3(c)(3). Two copies of the notification of denial shall be mailed to the appropriate school official, one of which shall be retained for his records and the other shall be presented to the student-learner.

[35 FR 13884, Sept. 2, 1970]

§ 520.5 Conditions necessary for favorable review.

The following conditions must be satisfied before a special certificate may be issued authorizing the employment of a student-learner at subminimum wages:

(a) Any training program under which the student-learner will be employed must be a bona fide vocational training program as defined in § 520.2;

(b) The employment of the student-learner at subminimum wages authorized by the special certificate must be necessary to prevent curtailment of opportunities for employment;

(c) The student-learner must be at least sixteen years of age (or older) as may be required pursuant to paragraph (d) of this section;

(d) The student-learner must be at least 18 years of age if he is to be employed in any activity prohibited by virtue of a hazardous occupation order of the Secretary of Labor (See Part 570, Subpart E, of this chapter, but note the specific exemptions for student-learners in several of the orders);

(e) The occupation for which the student-learner is receiving preparatory training must require a sufficient degree of skill to necessitate a substantial learning period;

(f) The training must not be for the purpose of acquiring manual dexterity and high production speed in repetitive operations;

(g) The employment of a student-learner must not have the effect of displacing a worker employed in the establishment;

(h) The employment of the student-learners at subminimum wages must not tend to impair or depress the wage rates or working standards established for experienced workers for work of a like or comparable character;

(i) The occupational needs of the community or industry warrant the training of student-learners;

(j) There are no serious outstanding violations of the provisions of a student-learner certificate previously issued to the employer, or serious violations of any other provisions of the Fair Labor Standards Act of 1938, as amended, by the employer which provide reasonable grounds to conclude that the terms of the certificate would not be complied with, if issued;

(k) The issuance of such a certificate would not tend to prevent the development of apprenticeship in accordance with the regulations applicable thereto (Part 521 of this chapter) or would not impair established apprenticeship standards in the occupation or industry involved;

(l) The number of student-learners to be employed in one establishment must not be more than a small proportion of its working force.

[18 FR 3290, June 10, 1953, as amended at 21 FR 1349, Mar. 1, 1956; 26 FR 8009, Aug. 26, 1961; 35 FR 13884, Sept. 2, 1970]

§ 520.6 Terms and conditions of employment under special student-learner certificates.

(a) The special minimum wage rate shall be not less than 75 percent of the applicable minimum under section 6 of the act.

(b) No special student-learner certificate may be issued retroactively.

(c)(1) The number of hours of employment training each week at subminimum wages pursuant to a certificate, when added to the hours of school instruction, shall not exceed 40 hours, except that authorization may be granted by the Administrator or his authorized representative for a greater number of hours if found to be justified by extraordinary circumstances.

(2) When school is not in session on any school day, the student-learner may work a number of hours in addition to the weekly hours of employment training authorized by the certificate: *Provided, however,* That the total hours worked shall not exceed 8 hours on any such day. A notation shall be made in the employer's records to the effect that school not being in session was the reason additional hours were worked on such day.

(3) During the school term, when school is not in session for the entire week, the student-learner may work at his employment training a number of hours in the week in addition to those authorized by the certificate: *Provided, however,* That the total hours shall not exceed 40 hours in any such week. A notation shall be made in the employer's records to the effect that school not being in session was the reason additional hours were worked in such week.

(d) A special student-learner certificate shall not constitute authorization to pay a subminimum wage rate to a student-learner in any week in which he is employed for a number of hours in addition to the number authorized in the certificate, except as provided in paragraphs (c)(1), (2), and (3) of this section.

[35 FR 13884, Sept. 2, 1970]

§ 520.7 Employment records to be kept.

In addition to any other records required under the record-keeping regulations (Part 516 of this chapter) the employer shall keep the following records specifically relating to student-learners employed at subminimum wage rates:

(a) Any worker employed as a student-learner shall be identified as such on the payroll records, with each student-learner's occupation and rate of pay being shown;

(b) The employer's copy of the application, filed in accordance with § 520.4(a) and any certificate issued by the Administrator or his authorized representative must be available at all times for inspection for a period of 3 years from the last date of employment of the student-learner.

(c) Notations should be made in the employer's records when additional hours are worked by reason of school not being in session as provided in § 520.6(c) (2) and (3).

[18 FR 3291, June 10, 1953, as amended at 35 FR 13884, Sept. 2, 1970]

§ 520.8 Duration of certificates.

A special student-learner certificate shall be effective for a period not to exceed the length of 1 school year unless a longer period is found to be justified by extraordinary circumstances. No certificate shall authorize employment training beyond the date of graduation.

[35 FR 13885, Sept. 2, 1970]

§ 520.9 Compliance with established standards.

No provision of the regulations contained in this part, or of any certificate or temporary authority thereunder, shall excuse noncompliance with higher standards applicable to student-learners which may be established under any other Federal law, or any State law, municipal ordinance or trade union agreement.

[35 FR 13885, Sept. 2, 1970]

§ 520.10 Reconsideration and review.

(a) Any person aggrieved by the action of an authorized representative of the Administrator in denying or granting a special student-learner certificate may within 15 days after such action, (1) file a written request for reconsideration thereof by the authorized representative of the Administrator who made the decision in the first instance, or (2) file a written request for review of the decision by the Administrator or an authorized representative who has taken no part in the action which is the subject of review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision and a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the reconsidered determination of an authorized representative of the Administrator may, within 15 days after such determination, file a written request for review.

(d) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(e) If a request for reconsideration or review is granted, the Administrator or his authorized representative may, to the extent he deems it appropriate, afford other interested persons an opportunity to present data and views.

[18 FR 3291, June 10, 1953, as amended at 21 FR 1349, Mar. 1, 1956; 22 FR 5683, July 18, 1957; 24 FR 204, Jan. 8, 1959]

§ 520.11 Amendment to the regulations in this part.

The Administrator may at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of the regulations contained in this part.

[18 FR 3292, June 10, 1953]

PART 521—EMPLOYMENT OF APPRENTICES

Sec.

521.1 Employment of apprentices at subminimum wages.
521.2 Definitions.
521.3 Standards of apprenticeship.
521.4 Criteria for a skilled trade.
521.5 Procedure for employment of an apprentice at subminimum wages.
521.6 Issuance of special certificates.
521.7 Terms of special certificates.
521.8 Records.
521.9 Amendment of this part.
521.10 Investigations and hearings.
521.11 Reconsideration and review.

Authority: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214, unless otherwise noted.

Source: 16 FR 8884, Sept. 1, 1951, unless otherwise noted.

§ 521.1 Employment of apprentices at subminimum wages.

The Administrator or his authorized representative, to the extent necessary in order to prevent curtailment of opportunities for employment, shall issue special certificates to employers or joint apprenticeship committees[1] authorizing the employment of apprentices in skilled trades at wages lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act of 1938, as amended, subject to the conditions and limitations prescribed in this part.

§ 521.2 Definitions.

As used in this part:

(a) "Apprentice" means a worker at least sixteen years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade as defined in § 521.4, and in conformity with or substantial conformity with the standards of apprenticeship as set forth in § 521.3.

(b) "Apprenticeship agreement" means a written agreement between an apprentice and either his employer or a joint apprenticeship committee, which contains the terms and conditions of the employment and training of the apprentice, and which conforms or substantially conforms with the standards of apprenticeship set forth in § 521.3.

(c) "Apprenticeship program" means a complete plan of terms and conditions for the employment and training of apprentices which conforms or substantially conforms with the standards of apprenticeship, as set forth in § 521.3.

(d) "Joint apprenticeship committee" means a local committee, equally representative of employers and employees, which has been established by a group of employers and a bona fide bargaining agent or agents, to direct the training of apprentices with whom it has made agreements. This term does not include a joint apprenticeship committee established for an individual plant.

(e) "Recognized apprenticeship agency" means either (1) a state apprenticeship agency recognized by the Bureau of Apprenticeship, United States Department of Labor, or (2) if no such apprenticeship agency exists in the state, the Bureau of Apprenticeship, United States Department of Labor.

(f) "Registration" means the approval by a recognized apprenticeship agency of an apprenticeship program or agreement as meeting the basic standards adopted by the Bureau of Apprenticeship, United States Department of Labor, upon the recommendation of the Federal Committee on Apprenticeship.

(g) "State" means any state of the United States or the District of Columbia or any territory or possession of the United States.

§ 521.3 Standards of apprenticeship.

An apprenticeship program must conform with or substantially conform with the following standards of apprenticeship before the Administrator or his authorized representative will issue a special certificate authorizing employment of an apprentice under such program at wages lower than the minimum wages applicable under section 6 of the act:

(a) Employment and training of the apprentice in a skilled trade. A skilled trade is an apprenticeable occupation which satisfies the criteria set forth in § 521.4.

(b) One year or more (2,000 or more hours) of work experience.

(c) A progressively increasing schedule of wages to be paid the apprentice which averages at least 50 percent of the journeyman's rate over the period of apprenticeship.

(d) A schedule of work processes or operations in which experience is to be given the apprentice on the job.

(e) Submission of the apprenticeship program and the apprenticeship agreement to the recognized apprenticeship agency for registration as provided in § 521.5.

---

[1] An individual employer participating in an apprenticeship program under the control and supervision of a joint apprenticeship committee may employ an apprentice under a temporary or special certificate issued to or held by such joint apprenticeship committee. However, it is the responsibility of the employer, and not of the joint apprenticeship committee, that such employment be in compliance with the regulations and with the certificate.

(f) Joint agreement to the apprenticeship program by the employer and the bona fide bargaining agent, where a bargaining agent exists.

(g) An indication that the number of apprentices to be employed conforms to the needs and practices in the community.

(h) Adequate facilities for training and supervision of the apprentice and the keeping of appropriate records concerning his progress.

(i) Related instruction, if available, (144 hours a year is normally considered necessary. Related instruction means an organized and systematic form of instruction which is designed to provide the apprentice with knowledge of the theoretical and technical subjects related to his trade. Such instruction may be given in a classroom, through correspondence courses, or other forms of self-study.)

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[16 FR 8884, Sept. 1, 1951, as amended at 43 FR 12311, Mar. 24, 1978]

§ 521.4 Criteria for a skilled trade.

A skilled trade is an apprenticeable occupation which possesses all of the following characteristics:

(a) Is customarily learned in a practical way through training and work experience on the job.

(b) Is clearly identified and commonly recognized throughout an industry.

(c) Requires one year or more (2,000 or more hours) of work experience to learn.

(d) Requires related instruction to supplement the work experience (which instruction may be provided in accordance with § 521.3(i)).

(e) Is not merely a part of an apprenticeable occupation.

(f) Involves the development of skill sufficiently broad to be applicable in like occupations throughout an industry, rather than of restricted application to the products of any one company.

(g) Does not fall into any of the following categories:

(1) Selling, retailing, or similar occupations in the distributive field.

(2) Managerial occupations.

(3) Clerical occupations.

(4) Professional and semi-professional occupations (this category covers occupations for which entrance requirements customarily include education of college level).

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[16 FR 8884, Sept. 1, 1951, as amended at 43 FR 12311, Mar. 24, 1978]

§ 521.5 Procedure for employment of an apprentice at subminimum wages.

(a) Before an apprentice may be employed at subminimum wages, the employer or joint apprenticeship committee shall submit or shall have submitted an apprenticeship program to the appropriate recognized apprenticeship agency for registration.

(b) An apprenticeship program which has been registered with a recognized apprenticeship agency shall constitute a temporary special certificate authorizing the employment of an apprentice at the wages and under the conditions specified in such program until a special certificate is issued or denied. This temporary authorization is, however, conditioned on the requirement that within 90 days from the beginning date of employment of the apprentice, the employer or the joint apprenticeship committee shall satisfy all the following requirements: (1) Enter into an apprenticeship agreement with each apprentice, (2) submit the agreement to the recognized apprenticeship agency for registration, and (3) send one true copy of the apprenticeship agreement, with evidence of registration, to the appropriate Regional Office of the Wage and Hour Division, United States Department of Labor: *Provided, however*, That the Administrator or his authorized representative has not previously notified the employer or joint apprenticeship committee of disapproval of a registered apprenticeship agreement for the same or similar trade or trades as not conforming or substantially conforming with the standards of apprenticeship set forth in § 521.3.

(c) If the agreement submitted to the Wage and Hour Division has not been registered, it should be accompanied by an explanation of the efforts made to have the agreement registered and the reasons, if any, given by the recognized apprenticeship agency for not registering it.

[16 FR 8884, Sept. 1, 1951, as amended at 17 FR 1995, Mar. 7, 1952; 23 FR 5215, July 9, 1958]

§ 521.6 Issuance of special certificates.

(a) If the apprenticeship agreement and other available information indicate that the requirements of § 521.3 and the other requirements of this part are satisfied the Administrator or his authorized representative shall issue a special certificate in accordance with § 521.1. Otherwise he shall deny the special certificates.

(b) The special certificate, if issued, shall be mailed to the employer or the joint apprenticeship committee and a copy shall be mailed to the apprentice. If a special certificate is denied, the employer or the joint apprenticeship committee, the apprentice and the recognized apprenticeship agency shall be given written notice of the denial. The employer shall pay the apprentice the minimum wage applicable under section 6 of the act from the date of receipt of notice of such denial.

(c) A special certificate will not be issued where there are serious outstanding violations involving the employee whom an apprentice certificate is being requested, or where there are any serious outstanding violations of a certificate previously issued, or where there have been any serious violations of the act which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

[20 FR 5972, Aug. 17, 1955]

§ 521.7 Terms of special certificates.

(a) Each special certificate shall specify the conditions and limitations under which it is granted, including the name of the apprentice, the skilled trade in which he is to be employed, the subminimum wage rates and the periods of time during which such wage rates may be paid.

(b) The terms of any special certificate, including the wages specified therein, may be amended for cause.

§ 521.8 Records.

(a) Every employer who employs an apprentice under this part must keep the records called for under the recordkeeping regulations (Part 516 of this chapter), including designation of apprentices on the payroll. In addition, every employer who employs apprentices under temporary or special certificates issued to or held by such employer shall preserve the apprenticeship program, apprenticeship agreement and special certificate under which such apprentice is employed.

(b) Every joint apprenticeship committee which holds a certificate under this part shall keep the following records for each apprentice under its control and supervision:

(1) The apprenticeship program, apprenticeship agreement and special certificate under which the apprentice is employed by an employer;

(2) The cumulative amount of work experience gained by the apprentice, in order to establish the proper wage at the time of his assignment to an employer; and

(3) A list of the employers to whom the apprentice was assigned and the period of time he worked for each employer.

(c) The records required by paragraphs (a) and (b) of this section shall be maintained and preserved for at least three years from the termination of the apprenticeship. Such records shall be kept safe and accessible at the place or places of employment or at the place or places where such records are customarily maintained. All records shall be open at any time to inspection and transcription by the Administrator or his authorized representative.

§ 521.9 Amendment of this part.

The Administrator may at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of this part.

[22 FR 5683, July 18, 1957]

§ 521.10 Investigation and hearings.

The Administrator or his authorized representative may conduct an investigation, which may include a hearing, prior to issuing or denying an application for a special certificate. To the extent he deems appropriate, the Administrator or his authorized representative may provide an opportunity to other interested persons to present data and views on the application prior to granting or denying an apprentice certificate.

[24 FR 204, Jan. 8, 1959]

§ 521.11 Reconsideration and review.

(a) Any person aggrieved by the action of an authorized representative of the Administrator in denying or granting a special certificate may, within 15 days after such action, (1) file a written request for reconsideration thereof by the authorized representative of the Administrator who made the decision in the first instance, or (2) file a written request for review of the decision by the Administrator or an authorized representative who has taken no part in the action which is the subject of review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision together with a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the action of an authorized representative of the Administrator in denying a request for reconsideration may, within 15 days thereafter, file with the Administrator a written request for review.

(d) Any person aggrieved by the reconsidered determination of an authorized representative of the Administrator may within 15 days after such determination file with the Administrator a written request for review.

(e) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(f) If a request for reconsideration or review is granted, the Administrator or his authorized representative may, to the extent he deems it appropriate, afford other interested persons an opportunity to present data and views.

[20 FR 5972, Aug. 17, 1955, as amended at 22 FR 5683, July 18, 1957; 24 FR 204, Jan. 8, 1959]

PART 522—EMPLOYMENT OF LEARNERS

GENERAL REGULATIONS

Sec.
522.1 Applicability of regulations contained in this part.
522.2 Definitions.
522.3 Application for a learner certificate.
522.4 Procedure for action upon an application.
522.5 Conditions governing issuance of a learner certificate.
522.6 Terms and conditions of employment under learner certificates.
522.7 Employment records to be kept.
522.8 Amendment or replacement of a learner certificate.
522.9 Reconsideration and review.
522.10 Supplemental industry regulations.
522.11 Amendment or revocation of the regulations contained in this part.

EMPLOYMENT OF LEARNERS IN SPECIFIED INDUSTRIES

APPAREL INDUSTRY

522.20 Applicability of general learner regulations.
522.21 Applicability of §§ 522.20 to 522.25.
522.22 Number or proportion of learners.
522.23 Learner occupations and learning periods.
522.24 Special minimum wage rates.
522.25 General denial and restriction policies.

KNITTED WEAR INDUSTRY

522.30 Applicability of general learner regulations.
522.31 Applicability of §§ 522.30 to 522.35.
522.32 Number or proportion of learners.
522.33 Learner occupations.
522.34 Learning periods.
522.35 Special minimum wage rates.

HOSIERY INDUSTRY

522.40 Applicability of general learner regulations.
522.41 Applicability of §§ 522.40 to 522.43.
522.42 Number or proportion of learners.

BEST DOCUMENT AVAILABLE

Sec.
522.43 Learner occupations, learning periods and special minimum wage rates.

SHOE MANUFACTURING INDUSTRY

522.50 General denial policy.
522.51 Applicability of § 522.50.

GLOVE INDUSTRY

522.60 Applicability of general learner regulations.
522.61 Applicability of §§ 522.60 to 522.65.
522.62 Number or proportion of learners.
522.63 Learner occupations.
522.64 Learning period.
522.65 Special minimum wage rates.

CIGAR INDUSTRY

522.80 Applicability of general learner regulations.
522.81 Applicability of §§ 522.80 to 522.85.
522.82 Number or proportion of learners.
522.83 Learner occupations.
522.84 Learning periods.
522.85 Special minimum wage rates.

LUGGAGE, SMALL LEATHER GOODS AND LADIES' HANDBAG INDUSTRIES

522.90 Applicability of general learner regulations.
522.91 Applicability of §§ 522.90 to 522.93.
522.92 Issuance of learner certificates.
522.93 Learner certificates in extraordinary circumstances.

SMALL ELECTRICAL PRODUCTS INDUSTRY

522.100 Applicability of general regulations.
522.101 Applicability of §§ 522.100 to 522.103.
522.102 Issuance of learner certificates.
522.103 Learner certificates in exceptional circumstances.

MEN'S AND BOYS' CLOTHING INDUSTRY

522.104 General denial policy.

OFFICE AND CLERICAL OCCUPATIONS IN ANY INDUSTRY

522.105 General denial policy.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214, unless otherwise noted.

GENERAL REGULATIONS

§ 522.1 Applicability of regulations contained in this part.

(a) The regulations contained in this part are issued in accordance with section 14 of the Fair Labor Standards Act of 1938, as amended, to provide for the employment under special certificates of learners at wages lower than the minimum wage applicable under section 6 of the act. That section, in pertinent part, reads:

> The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners * * * under special certificates issued pursuant to the regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe * * *

(b) Such certificates shall be subject to the provisions herinafter set forth and to such additional terms and conditions as may be established in supplemental regulations applicable to the employment of learners in particular industries issued pursuant to § 522.10.

[20 FR 646, Jan. 29, 1955]

§ 522.2 Definitions.

As used in the regulations contained in this part:

(a) A "learner" is a worker whose total experience in an authorized learner occupation in the industry within the past three years, except as otherwise provided in applicable supplemental regulations for a particular industry, is less than the period of time allowed as a learning period for that occupation in a learner certificate issued pursuant to the regulations in this part.

(b) An "experienced worker" is a worker whose total experience in an authorized learner occupation in the industry within the past three years, except as otherwise provided in applicable supplemental regulations for a particular industry, is at least equal to the period of time allowed as a learning period for that occupation in a learner certificate issued pursuant to the regulations in this part.

(c) "Experienced worker available for employment" means an experienced worker residing within the area from which the plant customarily draws its labor supply or within a reasonable commuting distance of such area, and who is willing and able to accept employment in the plant; or an experienced worker residing outside of the area from which the plant customarily draws its labor supply, who has in fact made himself available for employment at the plant. A former experienced worker of a plant or its predecessor which has closed and moved its operations to another locality, who has made himself available for employment by the employer, shall also be considered an experienced worker available for employment.

(d) A "new plant" is a plant which has been in operation in a given industry for less than eight months subsequent either to its initial establishment in that industry or to its reopening after being out of operation for a period of more than eight months.

(e) An "expanding plant" is a plant whose labor force is being substantially increased by reason of an expansion program (1) through the installation of additional production equipment; (2) through again placing into operation machinery which has been idle for a period in excess of 8 months; or (3) through adding an additional shift.

[20 FR 646, Jan. 29, 1955]

§ 522.3 Application for a learner certificate.

(a) Whenever the employment of learners at wages lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act of 1938, as amended, is believed necessary to prevent curtailment of opportunities for employment in a specified plant, an application for a certificate authorizing the employment of such learners at subminimum wage rates may be filed by the employer with the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210. A copy of such application shall be filed simultaneously with the appropriate Regional Office of these Divisions. With respect to employees working in Puerto Rico or in the Virgin Islands, application shall be filed with the Territorial Director of the Wage and Hour Division, U.S. Department of Labor, Santurce, San Juan, Puerto Rico.

(b) Application must be made on the official form furnished by these Divisions and must contain all information required by such form, including among other things, information concerning efforts made by the applicant to obtain experienced workers, the occupations in which learners are to be employed, the number of learners previously hired, whether learners are actually available, the number of learners requested, their proposed hourly rates and learning periods in number of hours, the number of experienced workers in such occupations and their straight-time average hourly earnings during the last payroll period, the number of plant workers employed during previous periods, and the type of equipment to be used by learners. Any applicant may also submit such additional information as may be pertinent.

(c) Any application which fails to present the information required by the forms may be returned to the applicant with a notation of deficiencies and without prejudice against submission of a new or revised application.

(d) Separate application must be made with respect to each plant in which the applicant desires to employ learners at subminimum wage rates. Where an establishment occupies several buildings in the same community and the workers in those buildings are engaged in the various processes necessary to the manufacture of primary products of the establishment, the workers shall be regarded as employees of the same plant for the purposes of the regulations in this part.

(e) When an application is filed for a learner certificate for a new or expanding plant and the applicant is moving from a plant of the same company or of a closely related company in another location, or is tranferring production from such plant, or has recently so moved or transferred production, the applicant shall attach to the application a signed statement giving the following information: (1) Name, location and products of the plant from which the applicant is moving or is transferring production; (2) average and minimum wage rates paid at such plant for the occupations in which learners are requested to be employed at subminimum rates; and (3) reasons for removal or transfer of production.

(f) Application for a renewal of a learner certificate shall be made on the same form as described in this section. No effective learner certificate shall expire until action on an application for renewal shall have been finally determined, provided that such application has been properly executed in accordance with the requirements, and filed with and received by the Administrator of the Wage and House and Public Contracts Divisions not less than fifteen nor more than thirty days prior to the expiration date. A final determination means either the granting of or initial denial of the application for renewal of a learner certificate, or withdrawal of the application. A "properly executed application" is one which contains the complete information required on the form, and the required certification by a responsible official of the applicant company.

(g) Upon making application for a learner certificate or for renewal thereof, an employer shall post a notice of filing of application on a form supplied by these Divisions in a conspicuous place in each department of the plant where he proposes to employ learners at subminimum wage rates. Such notice shall remain posted until such time as the application shall have been acted upon by the Administrator or his authorized representative. The notice must set forth, among other things, the number of learners that the employer has requested permission to employ; the occupations in which the learners will be employed; and a representation by a responsible official that experienced workers are not available, and that the employment of learners at subminimum wage rates is necessary in order to prevent a curtailment of opportunities for employment.

[20 FR 646, Jan. 29, 1955]

§ 522.4 Procedure for action upon an application.

(a) Upon receipt of an application for a certificate or a renewal of a certificate, the Administrator or his authorized representative shall consider all of the relevant facts and, subject to the conditions specified in § 522.5, shall issue or deny a learner certificate. To the extent he deems appropriate, the Administrator or his authorized representative may provide an opportunity to other interested persons to present data and views on the application prior to granting or denying a learner certificate.

(b) If a learner certificate is issued, there shall be published in the Federal Register a statement of the terms of such certificate together with a notice that, pursuant to § 522.9, for fifteen (15) days following such publication any interested persons may file written requests for reconsideration or review.

(c) If a learner certificate is denied, notice of such denial shall be sent to the employer and such denial shall be without prejudice to the filing of any subsequent application.

[20 FR 647, Jan. 29, 1955, as amended at 24 FR 204, Jan. 8, 1959]

§ 522.5 Conditions governing issuance of a learner certificate.

The following conditions shall govern the issuance of a special certificate authorizing the employment of learners at subminimum wage rates:

(a) An adequate supply of qualified experienced workers is not available for employment; the experienced workers presently employed in the plant in occupations in which learners are requested are afforded an opportunity, to the fullest extent possible, for full-time employment; learners are available for employment; and the granting of a certificate is necessary in order to prevent curtailment of opportunities for employment.

(b) Reasonable efforts have been made to recruit experienced workers, including the placement of an order with the local State or Territorial Public Employment Service Office (except in possessions where there is not such office) not more than fifteen days prior to the date of application. Written evidence from such office that the order has been placed shall be submitted by the employer with the application.

(c) The issuance of a learner certificate will not tend to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage or working standards established for experienced workers for work of a like or comparable character in the industry.

(d) Abnormal labor conditions such as a strike, lock-out, or other similar condition, do not exist at the plant for which a learner certificate is requested.

(e) There are no serious outstanding violations of the provisions of a learner certificate previously issued to the company, nor have there been any serious violations of the act which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

(f) The occupation or occupations in which learners are to receive training involve a sufficient degree of skill to necessitate an appreciable training period.

(g) Learners shall be afforded every reasonable opportunity for continued employment upon completion of the learning period.

[20 FR 647, Jan. 29, 1955, as amended at 22 FR 554, Jan. 29, 1957]

§ 522.6 Terms and conditions of employment under learner certificates.

(a) A learner certificate, if issued, shall specify, among other things: (1) The number or proportion of learners authorized to be employed on any one day; (2) the occupations in which learners may be employed; (3) the subminimum wage rates permitted during the authorized learning period; (4) the learning period for each authorized learner occupation; and (5) the effective and expiration dates of the certificate.

(b) A learner certificate for normal labor turnover purposes may be issued for a period not longer than one year. A learner certificate for a new or expanding plant may be issued for a period not longer than six months. A renewal certificate will not be issued unless there is a clear showing that the conditions set forth in § 522.5 still prevail. A renewal expansion certificate will not be issued unless there is also a clear showing that there has been a substantial increase in the labor force during the period when a previous expansion certificate was in effect, except for individual cases where the plant expansion program has been postponed due to exceptional circumstances.

(c) Learners properly hired prior to the date on which a learner certificate expires may be continued in employment at subminimum wage rates for the duration of their authorized learning period under the terms of the certificate, even though the certificate expired before the learning period is completed.

(d) A copy of the learner certificate shall be posted by the employer during its effective period in a conspicuous place in each department of the plant where learners are to be employed.

(e) No learner certificate may be issued retroactively.

(f) No learners shall be hired under a learner certificate if, at the time the employment begins, experienced workers capable of equalling the performance of a worker of minimum acceptable skill are available for employment. Each time before hiring learners during the effective period of the certificate an order for experienced workers must be placed or be on active file with the local State or Territorial Public Employment Service Office (except in possessions where there is no such office). Written evidence that an order has been placed or is on active file shall be maintained in the employer's records.

(g) No learner shall be hired under a learner certificate while abnormal labor conditions such as a strike, lockout, or other similar condition, exist in the plant.

(h) Except as otherwise specified in applicable supplemental industry regulations, the number of hours of previous employment must be deducted from the authorized learning period if within the past three years a learner has been employed in a given occupation and industry for less than the total number of hours authorized as a learning period. There shall also be deducted from the authorized learning period all such hours of employment or training on rags or scrap, or pertinent training in vocational training schools or similar training facilities.

(i) Under no circumstances will certificate be granted authorizing the employment of learners at subminimum wage rates as homeworkers, or in maintenance occupations such as watchman or porter, or in operations of a temporary or sporadic nature.

(j) If experienced workers are paid on a piece rate basis, learners shall be paid at least the same piece rates as experienced workers employed on similar work in the plant and shall receive earnings based on such piece rates whenever such earnings exceed the subminimum wage rates permitted in the certificate.

(k) No provision of any learner certificate shall excuse noncompliance with higher standards applicable to learners which may be established under any other Federal law, or any State law, or trade union agreement.

[20 FR 647, Jan. 29, 1955, as amended at 22 FR 554, Jan 29, 1957]

§ 522.7 Employment records to be kept.

In addition to other records required under the record-keeping regulations (Part 516 of this chapter), the employer shall keep the following records specifically relating to learners employed at subminimum wage rates:

(a) Each worker employed as a learner under a learner certificate shall be designated as such on the payroll records kept by the employer. All such learners shall be listed together as a separate group on the payroll records, with each learner's occupation being shown.

(b) The employer shall also obtain at the time of hiring and keep in his records a statement signed by each such learner showing all applicable experience which the learner may have had in the industry in which he is employed during the preceding three years, or as otherwise required in the applicable supplemental industry regulations. The statement shall contain the dates of such previous employment, names and addresses of employers, the occupation or occupations in which the learner was engaged and the types of products upon which the learner worked. The statement shall also contain information concerning pertinent training in vocational training schools or similar training facilities, including the dates of such training and the identity of the vocational school or training facility. If the learner has had no applicable experience or pertinent training, a statement to that effect signed by the learner should likewise be kept in the employer's records.

(c) The employer shall maintain a file of all evidence and records, including any correspondence, pertaining to the filing or cancellation of job orders placed with the local State or Territorial Public Employment Service Office under §§ 522.5(b) and 522.6(f).

(d) The records required in this section, including a copy of any special certificate issued, shall be kept and made available for inspection at all times for at least three years from the last effective date of the certificate.

[20 FR 648, Jan. 29, 1955, as amended at 22 FR 555, Jan 29, 1957]

§ 522.8 Amendment or replacement of a learner certificate.

The Administrator upon his own motion may amend the provisions of a learner certificate when it is necessary by reason of the amendment of these or any supplemental industry regulations, or may withdraw a learner certificate and issue a replacement certificate when necessary to correct omissions or apparent defects in the original certificate.

[20 FR 648, Jan. 29, 1955]

§ 522.9 Reconsideration and review.

(a) Any person aggrieved by the action of an authorized representative of the Administrator denying or granting a learner certificate may, within 15 days after such action, (1) file a written request for reconsideration thereof by the authorized representative of the Administrator who made the decision in the first instance, or (2) file a written request for review of the decision by the Administrator or an authorized representative who has taken no part in the action which is the subject of review.

(b) A request for reconsideration shall be accompanied by a statement of the additional evidence which the applicant believes may materially affect the decision and a showing that there were reasonable grounds for failure to present such evidence in the original proceedings.

(c) Any person aggrieved by the reconsidered determination of an authorized representative of the Administrator may within 15 days after such determination, file with the Administrator a written request for review.

(d) A request for review shall be granted where reasonable grounds for the review are set forth in the request.

(e) If a request for reconsideration or review is granted, the Administrator or his authorized representative may, to the extent he deems it appropriate, afford other interested persons an opportunity to present data and views.

[20 FR 648, Jan. 29, 1955, as amended at 21 FR 5316, July 17, 1956; 24 FR 204, Jan. 8, 1959]

§ 522.10 Supplemental industry regulations.

(a) Upon application of any person or persons, representing an industry or branch thereof, or upon his own motion, the Administrator, if he deems it advisiable, may, after appropriate and timely notice to interested parties, cause a hearing to be held to determine the need for the employment of learners at wages lower than the minimum wage applicable under section 6 of the act in order to prevent curtailment of opportunities for employment in an industry or branch thereof; and if such need is found to exist, to determine the occupation or occupations which require a learning period and the limitations as to wages, time, number, proportion, and length of service pursuant to which learner certificates authorizing the employment of learners at such subminimum wage rates may be issued to employers. Such hearing shall be held before the Administrator or his duly authorized representative. Following such hearing the Administrator shall, by supplemental regulations, prescribe the conditions under which special certificates shall be issued for the employment of learners in such industry or branch thereof, if he determines that there is a need therefor to prevent curtailment of opportunities for employment.

(b) The Administrator may issue a subpoena for attendance at such hearings to any party upon request and upon a showing of general relevance and reasonable scope of the evidence sought. The Administrator may, on his own motion, or that of his authorized representative, cause to be brought before him or his authorized representative any witness whose testimony he deems material to the matter in issue.

(c) Such supplemental regulations as are issued shall not apply to the employment of learners at subminimum wage rates in Puerto Rico or the Virgin Islands, unless they so provide.

[20 FR 648, Jan. 29, 1955. Redesignated at 21 FR 5316, July 17, 1956]

§ 522.11 Amendment or revocation of the regulations contained in this part.

The Administrator may at any time upon his own motion or upon written request of any interested person or persons setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of the regulations in this part or of the supplemental regulations applicable to the employment of learners in particular industries.

[20 FR 648, Jan. 29, 1955. Redesignated at 21 FR 5316, July 17, 1956]

EMPLOYMENT OF LEARNERS IN SPECIFIED INDUSTRIES

APPAREL INDUSTRY

SOURCE: 28 FR 1422, Feb. 14, 1963, unless otherwise noted.

§ 522.20 Applicability of general learner regulations.

The employment of learners pursuant to the provisions of §§ 522.20 through 522.24 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 through 522.9), except to the extent to which any provision of such general regulations is inconsistent with any provisions of §§ 522.20 through 522.25.

§ 522.21 Applicability of §§ 522.20 to 522.25.

For purposes of §§ 522.20 to 522.25, the apparel industry consists of the following six divisions:

(a) Women's apparel, defined as follows: The production of women's, misses' and juniors' dresses; washable service garments; blouses from woven or purchased knit fabric; women's, misses', children's and infants' underwear, nightwear and negligees from woven fabrics; corsets and other body supporting garments from any material; infants' and children's outerwear; and other garments similar to the foregoing.

(b) Single pants, shirts and allied garments, defined as follows: The production of men's and boys' single pants, washable service garments, work shirts, overalls, overall jackets and coveralls from any material; dress and sport shirts from woven fabric or purchased knit fabric; and collars and sleeping wear from woven fabric.

(c) Sportswear and other odd outerwear, defined as follows: The manufacture of men's, women's and children's sportswear and other odd outerwear, including windbreakers, lumberjackets, mackinaws and mackinaw coats, melton jackets, blanket-lined and similar coats, leatherette coats and jackets, hunting coats and vests, riding clothing, ski-suits and snow-suits (except children's ski-suits and snow-suits), and similar garments from any woven materials or from purchased knitted materials.

(d) Rainwear, defined as follows: The manufacture of waterproofed garments and raincoats from oiled cloth or other materials, whether vulcanized, rubberized, cravenetted, or otherwise processed.

(e) Robes, defined as follows: The manufacture of robes from any woven material or from purchased knitted materials, including, without limitation, men's, women's and children's bath, lounging and beach robes and dressing gowns.

(f) Leather and sheep-lined clothing, defined as follows: The manufacture of leather, leather-trimmed and sheep-lined garments for men, women or children.

§ 522.22 Number or proportion of learners.

(a) The number of learners which any employer may be authorized to employ by any special certificate issued to meet normal labor turnover needs shall not exceed on any one workday ten percent of the total number of factory production workers in the plant: *Provided*, That, in plants employing less than 100 workers, a maximum of ten learners may be authorized.

(b) Special certificates may be issued to new or expanding plants authorizing the employment of learners in authorized occupations to the extent of need.

§ 522.23 Learner occupations and learning periods.

(a) In the occupations of sewing machine operating, final pressing, hand-sewing, and finishing operations involving hand-sewing, learners may be employed under a certificate at special minimum wage rates as provided in § 522.24 for a period not to exceed 320 hours. In the occupation of pressing (other than final pressing), a learner may be employed at such rates for a period not to exceed 160 hours.

(b) In the occupations of final inspection of assembled garments and of other machine operating (except the "cutting room" operations of knife or diecutting, spreading, and marking, wherever performed in the plant), a learner may be employed under a certificate at special minimum wage rates as provided in § 522.24 for a period not to exceed 160 hours: *Provided, however*, That these occupations shall be authorized under a certificate only in exceptional circumstances upon a showing by an individual employer making application for a special certificate that the occupation(s) as performed in the plant do in fact require substantial skill, training and judgment, and that opportunities for employment will in fact be curtailed in the absence of a certificate specifically authorizing the employment of learners at special minimum wage rates in these occupations.

(c) No worker shall be employed as a learner at special minimum rates in more than two of the learner occupations authorized by this section.

(d) If, within the previous three years, a worker has been employed in any division of the apparel industry, or in the manufacturing of men's and boys' underwear from any woven fabric in establishments in the knitted wear industry, in an authorized learner occupation for less than the maximum period authorized for that occupation, the number of hours of previous employment shall be deducted from the learning period applicable to that occupation.

§ 522.24 Special minimum wage rates.

(a) The special minimum rates of learners employed in occupations for which a 320-hour period is authorized under § 522.23(a) shall during that period be not less than $2.50 an hour through December 31, 1978; not less than $2.75 an hour through December 31, 1979; not less than $2.95 an hour through December 31, 1980; and not less than $3.20 an hour thereafter.

(b) The rates for experienced workers in any one of the occupations shown in § 522.23(a) for which a 320-hour learning period is authorized, who are being retrained under the terms of a learner certificate in any other occupation shown in that paragraph having such a 320-hour maximum period, shall be not less than $2.50 an hour for the first 160 hours and not less than $2.55 an hour for the remaining 160 hours through December 31, 1978; not less than $2.75 an hour for the first 160 hours and not less than $2.80 an hour for the remaining 160 hours through December 31, 1979; not less than $2.95 an hour for the first 160 hours and not less than $3 an hour for the remaining 160 hours through December 31, 1980; and not less than $3.20 an hour for the first 160 hours and not less than $3.25 an hour for the remaining 160 hours thereafter.

(c) The rates for learners employed in the occupation of final inspection of assembled garments under § 522.23(b) shall be not less than $2.55 an hour during the authorized 160-hour learning period through December 31, 1978; not less than $2.80 an hour during such authorized learning period through December 31, 1979; not less than $3 an hour during such authorized learning period through December 31, 1980; and not less than $3.25 an hour during such authorized learning period thereafter.

(d) The rates for learners employed in any occupation, other than final inspection of assembled garments, for which a 160-hour learning period is authorized in § 522.23 (a) or (b) shall be not less than $2.50 an hour through December 31, 1978; not less than $2.75 an hour through December 31, 1979; not less than $2.95 an hour through December 31, 1980; and, not less than $3.20 an hour thereafter.

(e) The earnings of learners employed in occupations in which experienced workers are compensated on a piece-rate basis shall be based on those piece rates when they yield more than the authorized special minimum wage rates, in accordance with § 522.6(j).

(f) No experienced worker shall be employed under the terms of a learner certificate, except as provided in paragraph (b) of this section and in paragraph (c) of § 522.23.

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[39 FR 29180, Aug. 14, 1974, as amended at 43 FR 5816, Feb. 10, 1978]

§ 522.25 General denial and restriction policies.

(a) All applications for special certificates authorizing the employment of learners at special minimum wage rates in the manufacture of products in the following divisions shall be denied:

(1) The rainwear division of the apparel industry as defined in § 522.21(d);

(2) The leather and sheep-lined clothing division of the apparel industry as defined in § 522.21(f).

(b) Applications for special certificates authorizing the employment of learners at special minimum wage rates shall also be denied:

(1) In the women's apparel division of the apparel industry as defined in § 522.21(a) for the manufacture of women's, misses', and juniors' dresses selling at or above $6.75 per dress or

$81.00 per dozen wholesale, before any discount, and for the manufacture of women's, misses', and juniors' blouses selling at or above $3.00 per blouse or $36.00 per dozen wholesale, before any discount;

(2) For the manufacture of the products of the robes division of the apparel industry as defined in § 522.21(e) unless the individual applicant provides substantial and preponderant evidence that opportunities for employment will in fact be curtailed in the absence of a certificate authorizing the employment of learners at special minimum wage rates.

KNITTED WEAR INDUSTRY

SOURCE: 20 FR 2305, Apr. 9, 1955, unless otherwise noted.

§ 522.30 Applicability of general learner regulations.

The employment of learners pursuant to the provisions of §§ 522.30 through 522.35 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 through 522.9), except to the extent to which any provision of such general regulations is inconsistent with any provision of §§ 522.30 through 522.35.

§ 522.31 Applicability of §§ 522.30 to 522.35.

For the purpose of §§ 522.30 to 522.35 the knitted wear industry is defined as follows:

(a) The manufacturing, dyeing or other finishing of any knitted fabric made from any yarn or mixture of yarns, except fulled suitings, coatings, topcoatings, or overcoatings containing more than 25 percent, by weight, of wool or animal fiber other than silk.

(b) The manufacturing, dyeing or other finishing, from any yarn or mixture of yarns, or from purchased knitted fabric, of any of the following products:

(1) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

(2) Fleece-lined garments; excluding, however, all fleece-lined garments made from purchased knitted fabric, except fabric containing cotton only or containing any mixture of cotton and not more than 25 percent, by weight, of wool or animal fiber other than silk.

(3) Knitted towels or cloths.

(c) Knitted shirts of cotton or any other fiber or any mixture of fibers which have been manufactured in the same establishment as that where the knitting process is performed.

(d) The manufacturing of men's and boys' underwear from any woven fabric.

(e) The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided*, That the manufacturing, dyeing or other finishing of gloves, mittens, and hosiery shall not be included.

§ 522.32 Number or proportion of learners.

(a) The number of learners which any employer may be authorized to employ by any special certificate issued to meet normal labor turnover needs shall not exceed on any one workday five percent of the total number of productive factory workers in the plant: *Provided*, That, in plants employing less than 100 workers, a maximum of 5 learners may be authorized.

(b) Special certificates may be issued to new or expanding plants authorizing the employment of learners in authorized occupations to the extent of need.

§ 522.33 Learner occupations.

Learners may be employed only in the occupations of machine knitter, machine stitcher, presser, winder, dyeing machine operator, brush machine operator, and dryer operator, except that in exceptional cases the employment of learners at a subminimum wage may be authorized in other occupations upon a showing by any individual employer making application for a special certificate that a denial would result in a curtailment of opportunities for employment.

§ 522.34 Learning periods.

(a) No worker shall be employed as a learner under the certificate after 480 hours' experience in the occupation of machine knitter, or 320 hours in the occupations of machine stitcher or presser, or 240 hours in the occupations of winder, dyeing machine operator, brush machine operator, or dryer operator.

(b) If a worker who is being trained in any authorized learner occupation has been employed in that same occupation in the knitted wear industry within the previous three years, the hours of such previous employment shall be deducted from the authorized learning period.

(c) If a worker is employed in the manufacture of men's and boys' underwear from any woven fabric in the occupations of machine stitcher or presser, all hours of employment within the previous three years as a machine stitcher or presser in the apparel industry shall be deducted from the authorized learning period in the event such worker is subsequently employed in the same occupation.

(d) No worker shall be employed as a learner at subminimum rates in more than two of the learner occupations authorized in § 522.33.

[20 FR 2305, Apr. 9, 1955, as amended at 23 FR 5664, July 26, 1958; 26 FR 8284, Sept. 2, 1961]

§ 522.35 Special minimum wage rates.

(a) The special minimum rate which may be authorized in special certificates issued in the knitted wear industry shall be not less than $2.55 an hour through December 31, 1978; not less than $2.80 an hour through December 31, 1979; not less than $3 an hour through December 31, 1980; and, not less than $3.25 an hour thereafter.

(b) The earnings of learners employed on a piece rate basis shall be based on those piece rates if in excess of the authorized subminimum rates, in accordance with § 522.6(j).

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[20 FR 2305, Apr. 9, 1955, as amended at 43 FR 5817, Feb. 10, 1078]

HOSIERY INDUSTRY

§ 522.40 Applicability of general learner regulations.

The employment of learners pursuant to the provisions of §§ 522.40 to 522.43 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 to 522.9), except to the extent to which any provision of such general regulations is inconsistent with any provision of §§ 522.40 to 522.43.

[26 FR 9583, Oct. 11, 1961]

§ 522.41 Applicability of §§ 522.40 to 522.43.

For purposes of §§ 522.40 to 522.43, the "hosiery industry" is defined as follows: The manufacture or processing of hosiery including, among other processes, the knitting, dyeing, clocking, and all phases of finishing hosiery, but not including the manufacture or processing of yarn or thread.

[26 FR 9583, Oct. 11, 1961]

§ 522.42 Number or proportion of learners.

(a) The number of learners which any employer may be authorized to employ by any special certificates issued to meet normal labor turnover needs shall not exceed on any one workday five percent of the total number of productive factory workers in the plant; provided that, in plants employing less than 100 workers, a maximum of 5 learners may be authorized.

(b) Special certificates may be issued to new or expanding plants authorizing the employment of learners in authorized occupations to the extent of need.

[20 FR 2306, Apr. 9, 1955]

§ 522.43 Learner occupations, learning periods and special minimum wage rates.

(a) A person who has had no previous experience in any of the following occupations in the hosiery industry may be employed as a learner in any one of the occupations for the maximum number of hours and at the special rates set out in paragraphs (a) (1) through (9) of this section.

(1) In the seamless branch, knitting (transfer top only) and looping, for 960 hours, at not less than $2.50 an hour for the first 480 hours and at not less than $2.575 for the remaining 480 hours through December 31, 1978; not less than $2.75 an hour for the first 480 hours and not less than $2.825 for the remaining 480 hours through December 31, 1979; at not less than $2.95 an hour for the first 480 hours and at not less than $3.025 for the remaining 480 hours through December 31, 1980; and not less than $3.20 for the first 480 hours and not less than $3.275 for the remaining 480 hours thereafter.

(2) In the seamless branch, pairing (women's nylon) and mending (women's nylon), for 720 hours at not less than $2.50 an hour for the first 360 hours and at not less than $2.575 for the remaining 360 hours through December 31, 1978; not less than $2.75 an hour for the first 360 hours and not less than $2.825 an hour for the remaining 360 hours through December 31, 1979; not less than $2.95 an hour for the first 360 hours and not less than $3.025 an hour for the remaining 360 hours through December 31, 1980; and not less than $3.20 an hour for the first 360 hours and not less than $3.275 an hour for the remaining 360 hours thereafter.

(3) In the seamless branch, topping, welting, and mending (other than women's nylon), for 480 hours at not less than $2.50 an hour through December 31, 1978; not less than $2.75 an hour through December 31, 1979; not less than $2.95 an hour through December 31, 1980; and, not less than $3.20 an hour thereafter.

(4) In the seamless branch, boarding (women's nylon), folding (women's nylon and rayon) and pairing (other than women's nylon), for 360 hours, at not less than $2.50 an hour through December 31, 1978; not less than $2.75 an hour through December 31, 1979; not less than $2.95 an hour through December 31, 1980; and not less than $3.20 an hour thereafter.

(5) In the seamless branch, knitting (except transfer top), seaming, examining and inspection, folding (other than women's nylon and rayon), and boarding (other than women's nylon), for 240 hours, at not less than $2.50 an hour through December 31, 1978; at not less than $2.75 an hour through December 31, 1979; and not less than $2.95 an hour through December 31, 1980; and not less than $3.20 an hour thereafter.

(6) In the full-fashioned branch, seaming (leg and foot), for 960 hours, at not less than $2.55 an hour for the first 480 hours and $2.625 an hour for the remaining 480 hours through December 31, 1978; at not less than $2.80 an hour for the first 480 hours and $2.875 an hour for the remaining 480 hours through December 31, 1979; at not less than $3 an hour for the first 480 hours and $3.075 an hour for the remaining 480 hours through December 31, 1980; and at not less than $3.25 an hour for the first 480 hours and at not less than $3.325 an hour for the remaining 480 hours thereafter.

(7) In the full-fashioned branch, pairing and mending, for 720 hours at not less than $2.55 an hour for the first 360 hours and not less than $2.625 an hour for the remaining 360 hours through December 31, 1978; at not less than $2.80 an hour for the first 360 hours and at not less than $2.875 an hour for the remaining 360 hours through December 31, 1979; at not less than $3 an hour for the first 360 hours and at not less than $3.075 an hour for the remaining 360 hours through December 31, 1980; and at not less than $3.25 an hour for the first 360 hours and at not less than $3.325 an hour for the remaining 360 hours thereafter.

(8) In the full-fashioned branch, boarding and folding, for 360 hours, at not less than $2.55 an hour through December 31, 1978; at not less than $2.80 an hour through December 31, 1979; at not less than $3 an hour through December 31, 1980; and at not less than $3.25 an hour thereafter.

(9) In the full-fashioned branch, examining and inspecting, and seaming (sewing—other than leg and foot), for 240 hours at not less than $2.55 an hour through December 31, 1978; at not less than $2.80 an hour through December 31, 1979; at not less than $3 an hour through December 31, 1980;

and at not less than $3.25 an hour thereafter.

(10) For purposes of paragraphs (a) (2) and (7) of this section, the occupation of mending is defined as the process of hand-mending hosiery, either in the greige or finished condition, excluding snagging or scratching performed as a full-time and continuous process, and excluding the operation of various types of mending machines, such as Vitos, Vanitas, Stelos or Marvel, except where the operation of such machines is incidental to the hand-mending operation and the use of such machinery is an adjunct to the hand-mending process. For purposes of paragraphs (a) (6) and (9) of this section, the occupation of seaming (leg and foot) is defined as the joining of the sides of full-fashioned fabric from toe to the top of the welt, to form the hosiery.

(b) The earnings of learners employed on a piece rate basis shall be based on those piece rates if in excess of the authorized special minimum rates, in accordance with § 522.6(j).

(c) A person who has had previous experience or training in the hosiery industry at any time in any authorized learner occupation for less than the authorized learning period may be employed as a learner in the same occupation at the applicable special minimum rates until the number of hours authorized for that occupation are completed.

(d) a worker who has had full training in any authorized learner occupation may be transferred to any other learner occupation for a period not to exceed one half of the learning period authorized for the occupation at not less than $2.575 an hour in the seamless branch and at not less than $2.625 an hour in the full-fashioned branch through December 31, 1978; at not less than $2.825 an hour in the seamless branch and at not less than $2.875 an hour in the full-fashioned branch through December 31, 1979; at not less than $3.025 an hour in the seamless branch and at not less than $3.075 an hour in the full-fashioned branch through December 31, 1980; and, at not less than $3.275 an hour in the seamless branch and at not less than $3.325 an hour in the full-fashioned branch thereafter. A worker who has partial training in any authorized learner occupation may be transferred to any other learner occupation for either: (1) A period not to exceed one-half of the learning period authorized for that occupation, at not less than $2.575 an hour in the seamless branch and at not less than $2.625 an hour in the full-fashioned branch through December 31, 1978; at not less than $2.825 an hour in the seamless branch and at not less than $2.875 an hour in the full-fashioned branch through December 31, 1979; at not less than $3.025 an hour in the seamless branch and at not less than $3.075 an hour in the full-fashioned branch through December 31, 1980; and, at not less than $3.275 an hour in the seamless branch and at not less than $3.325 an hour in the full-fashioned branch thereafter; or (2) the balance of the number of hours permitted as a learning period for the occupation to which he or she is being transferred, at the applicable special minimum rates set forth in paragraph (a) of this section: *Provided, however,* That (i) no worker may be employed as a learner at learner rates in more than two authorized occupations; (ii) no worker who has completed the authorized learning period in the occupation of pairing may be employed as a learner at learner rates in the occupation of folding or inspection; and (iii) no worker who has completed the authorized learning period may be employed as a learner at learner rates when transferring from the seamless branch of the hosiery industry to the full-fashioned branch or from the full-fashioned branch to the seamless branch, if the worker is employed in the same occupation as that in which he or she has been previously employed.

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[20 FR 2306, Apr. 9, 1955, as amended at 26 FR 9583, Oct. 11, 1961; 39 FR 29180, Aug. 14, 1974; 43 FR 5817, Feb. 10, 1978]

SHOE MANUFACTURING INDUSTRY

§ 522.50 General denial policy.

All applications for the employment of learners in the shoe manufacturing industry, as defined in § 522.51 at wages lower than the statutory minimum wage shall be denied.

[32 FR 665, Jan. 20, 1967]

§ 522.51 Applicability of § 522.50.

For the purpose of § 522.50, the shoe manufacturing industry is defined as follows:

(a) The manufacture or partial manufacture of footwear from any material and by any process except knitting, vulcanizing of the entire article or vulcanizing (as distinct from cementing) of the sole to the upper.

(b) The manufacture or partial manufacture of the following types of footwear, subject to the limitations of paragraph (a) of this section but without prejudice to the generality of that paragraph:

Athletic shoes.
Boots.
Boot tops.
Burial shoes.
Custom-made boots or shoes.
Moccasins.
Puttees, except spiral puttees.
Sandals.
Shoes completely rebuilt in a shoe factory.
Slippers.

(c) The manufacture from leather or from any shoe-upper material of all cut stock and findings for footwear, including bows, ornaments, and trimmings.

(d) The manufacture of the following types of cut stock and findings for footwear from any material except from rubber or composition of rubber, molded to shape:

Cutsoles, Midsoles, Insoles, Taps, Lifts, Rands, Toplifts, Bases, Shanks, Boxtoes, Counters, Stays, Stripping, Sock linings, Heel pads.

(e) The manufacture of heels from any material except molded rubber, but not including the manufacture of woodheel blocks.

(f) The manufacture of cut upper parts for footwear, including linings, vamps and quarters.

(g) The manufacture of pasted shoe stock.

(h) The manufacture of boot and shoe patterns.

Provided, That: The manufacture of cut stock and findings is included within this definition only when performed principally for their own use by companies engaged in the production of shoes.

[20 FR 2306, Apr. 9, 1955, as amended at 26 FR 8285, Sept. 2, 1961]

GLOVE INDUSTRY

§ 522.60 Applicability of general learner regulations.

The employment of learners pursuant to the provisions of §§ 522.60 to 522.65 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 to 522.9), except to the extent to which any provisions of such general regulations is inconsistent with any provision of §§ 522.60 to 522.65.

[26 FR 9583, Oct. 11, 1961]

§ 522.61 Applicability of §§ 522.60 to 522.65.

For purposes of §§ 522.60 to 522.65, the glove industry consists of the following four branches:

(a) *Leather glove branch.* This branch includes the manufacture of dress, semi-dress, and work gloves made entirely from leather.

(b) *Woven or knit fabric glove branch.* This branch includes the manufacture of dress or semi-dress gloves from woven or knit fabrics, or combinations of such fabrics with leather.

(c) *Knitted glove branch.* This branch includes the manufacture by machine knitting of gloves and mittens from all types of yarn.

(d) *Work glove branch.* This branch includes the manufacture of work gloves from any type of fabric or combination of fabric and leather.

[20 FR 2307, Apr. 9, 1955, as amended at 26 FR 9584, Oct. 11, 1961]

§ 522.62 Number or proportion of learners.

(a) The number of learners which any employer may be authorized to employ by any special certificate issued to meet normal labor turnover needs shall not exceed on any one work day ten percent of the total number of workers employed in the occupations designated in § 522.63:

Provided, That as many as ten learners may be authorized in any plant.

(b) Special certificates may be issued to new or expanding plants authorizing the employment of learners in authorized occupations to the extent of need.

[20 FR 2307, Apr. 9, 1955]

§ 522.63 Learner occupations.

Special certificates may be issued authorizing the employment of learners at special minimum wage rates in the glove industry in occupations of hand and machine stitching in the leather glove branch of the industry; in the occupation of machine stitching in the woven or knit fabric and work glove branches of the industry; and in the occupations of finger knitting and finger closing, and hand and machine stitching in the knitted glove branch of the industry.

[26 FR 9584, Oct. 11, 1961]

§ 522.64 Learning period.

(a) The maximum learning period which may be authorized in special certificates issued in the glove industry is 480 hours.

(b) If a worker has had previous experience in the glove industry, the total hours of employment within the previous three years shall be deducted from the maximum training period, as follows:

(1) Hand and machine stitching operations on leather gloves, if a worker is being trained in the leather glove branch.

(2) Finger knitting and finger closing operations on knitted gloves, hand stitching operations on leather or knitted gloves, and machine stitching on leather, knitted, or woven or knit fabric gloves, if a worker is being trained in the knitted glove branch.

(3) Machine stitching on leather, knitted, or woven or knit fabric gloves, if a worker is being trained in the woven or knit fabric branch.

(4) Machine stitching in any type of glove manufacturing, if a worker is being trained in the work glove branch.

[20 FR 2307, Apr. 9, 1955, as amended at 21 FR 581, Jan. 26, 1956]

§ 522.65 Special minimum wage rates.

(a) The special minimum wage rates which may be authorized in special certificates issued in the glove industry shall be as follows: (1) In the leather glove, woven or knit fabric glove, and knitted glove branches of the industry, not less than $2.50 an hour for the first 320 hours and at not less than $2.60 an hour for the remaining 160 hours through December 31, 1978; at not less than $2.75 an hour for the first 320 hours and at not less than $2.85 an hour for the remaining 160 hours through December 31, 1979; at not less than $2.95 an hour for the first 320 hours and at not less than $3.05 an hour for the remaining 160 hours through December 31, 1980; and at not less than $3.20 an hour for the first 320 hours and not less than $3.30 an hour for the remaining 160 hours thereafter.

(2) In the work glove branch of the industry, not less than $2.50 an hour for the first 320 hours and not less than $2.55 an hour for the remaining 160 hours through December 31, 1978; at not less than $2.75 an hour for the first 320 hours and not less than $2.80 an hour for the remaining 160 hours through December 31, 1979; at not less than $2.95 an hour for the first 320 hours and not less than $3.00 an hour for the remaining 160 hours through December 31, 1980; and, at not less than $3.20 an hour for the first 320 hours and not less than $3.25 an hour for the remaining 160 hours.

(b) The earnings of learners employed on a piece rate basis shall be based on those piece rates if in excess of the authorized subminimum rates, in accordance with § 522.6(j).

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[20 FR 2307, Apr. 9, 1955, as amended at 43 FR 5818, Feb. 10, 1978]

CIGAR INDUSTRY

§ 522.80 Applicability of general learner regulations.

The employment of learners pursuant to the provisions of §§ 522.80 through 522.85 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 through 522.9), except to the extent to which any provision of such general regulations is inconsistent with any provision of §§ 522.80 through 522.85.

[20 FR 2308, Apr. 9, 1955]

§ 522.81 Applicability of §§ 522.80 to 522.85.

For purposes of §§ 522.80 to 522.85 the cigar industry consists of the cigar manufacturing branch and the leaf processing branch of the cigar industry, which are defined as follows:

(a) (1) "The cigar manufacturing branch of the cigar industry" means the manufacture of cigars from any types of tobacco.

(2) The term "cigar" covers all types of cigars, including cheroots, stogies, and little cigars.

(3) The manufacture of cigars from noncigar types of leaf tobacco and the scrap tobacco therefrom includes the preliminary processing of such tobacco which is performed in the manufacturing plant as an integral part of the manufacturing operation; and

(b) (1) "The leaf processing branch of the cigar industry" means the preparation or marketing (including wholesaling) of cigar types of leaf tobacco (as defined by the Bureau of Agricultural Economics of the United States Department of Agriculture) and the scrap tobacco therefrom for use in the manufacture of cigars and other tobacco products.

(2) The term "preparation" as used herein includes all operations involved in making cigar leaf tobacco and scrap tobacco therefrom suitable for use in the manufacture of cigars, whether performed by employees of warehousemen, manufacturers, leaf dealers, or others. It includes, but not by way of limitation, the operations of grading, sorting, packing, sweating, fermenting, stemming, and conditioning. It does not include, however, such preliminary processing of cigar types of tobacco or scrap tobacco therefrom as is performed in a manufacturing plant as an integral part of the manufacturing operations attending the production of tobacco products other than cigars, nor does it include operations performed by a farmer or on a farm as an incident to or in conjunction with farming operations.

[20 FR 2308, Apr. 9, 1955]

§ 522.82 Number or proportion of learners.

(a) The number of learners which any employer may be authorized to employ by any certificate issued to meet normal labor turnover needs shall not exceed on any one workday ten percent of the total number of factory production workers in the plant: *Provided, however,* That in plants employing less than 100 production workers, a maximum of ten learners may be authorized.

(b) Special certificates may be issued to new or expanding plants authorizing the employment of learners in authorized occupations to the extent of need.

[20 FR 2308, Apr. 9, 1955, as amended at 23 FR 3925, June 5, 1958]

§ 522.83 Learner occupations.

Special certificates may be issued authorizing the employment of learners in the cigar industry in the occupations of cigar machine operating; cigar packing; hand bunch making; hand rolling; hand making Italian stogies; hand stripping; and machine stripping.

[23 FR 3925, June 5, 1958]

§ 522.84 Learning periods.

(a) The maximum learning period which may be authorized in special certificates issued in the cigar industry machine operating in 320 hours; for hand rolling, 960 hours; for hand bunch making, 960 hours; for hand making Italian stogies, 640 hours; for hand stripping, 160 hours; for machine stripping, 160 hours; for packing cigars retailing for more than six cents, 320 hours; and for packing cigars retailing for six cents or less, 160 hours: *Provided, however,* That a worker experienced in the packing of cigars retailing for six cents or less may be trained as a learner in packing cigars retailing for more than six cents for not more than 160 hours, and that a worker with 160 hours of more of experience in the packing of cigars retailing for more than six cents may not be retrained at subminimum wage rates for any period in packing cigars retailing for six cents or less.

(b) If a worker who is being trained in any machine occupation has been employed in that same occupation within the previous three years, the hours of such employment shall be deducted from the maximum learning period. If a worker who is being trained in any hand occupation has been employed in that same occupation within the previous five years, the hours of such employment shall be deducted from the maximum learning period for that occupation.

(c) No worker shall be employed as a learner at special minimum rates in more than two of the learner occupations authorized by § 522.83.

[20 FR 2308, Apr. 9, 1955, as amended at 23 FR 3925, June 5, 1958; 26 FR 8285, Sept. 2, 1961]

§ 522.85 Special minimum wage rates.

(a) The special minimum wage rates which may be authorized in special certificates issued in the cigar industry shall be as follows: (1) In the occupations of cigar machine operating and cigar packing, not less than $2.50 an hour through December 31, 1978; not less than $2.75 an hour through December 31, 1979; at not less than $2.95 an hour through December 31, 1980; and not less than $3.20 an hour thereafter.

(2) In the occupations of hand rolling and hand bunch making, not less than $2.50 an hour for the first 480 hours and $2.575 an hour for the second 480 hours through December 31, 1978; at not less than $2.75 an hour for the first 480 hours and $2.825 for the second 480 hours through December 31, 1979; not less than $2.95 an hour for the first 480 hours and $3.025 an hour for the second 480 hours through December 31, 1980; and not less than $3.20 an hour for the first 480 hours and $3.275 an hour for the second 480 hours thereafter.

(3) In the occupation of hand making Italian Stogies, not less than $2.50 an hour for the first 320 hours and $2.575 an hour for the second 320 hours through December 31, 1978; not less than $2.75 an hour for the first 320 hours and $2.825 an hour for the second 320 hours through December 31, 1979; not less than $2.95 an hour for the first 320 hours and $3.025 an hour for the second 320 hours through December 31, 1980; and not less than $3.20 an hour for the first 320 hours and $3.275 an hour for the second 320 hours thereafter.

(4) In the occupations of hand stripping and machine stripping, not less than $2.50 an hour through December 31, 1978; not less than $2.75 an hour through December 31, 1979; not less than $2.95 an hour through December 31, 1980; and not less than $3.20 an hour thereafter.

(b) The earnings of learners employed on a piece rate basis shall be based on those piece rates if in excess of the authorized subminimum rates, in accordance with § 522.6(j).

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[20 FR 2308, Apr. 9, 1955, as amended at 43 FR 5818, Feb. 10, 1978]

LUGGAGE, SMALL LEATHER GOODS AND LADIES' HANDBAG INDUSTRIES

§ 522.90 Applicability of general learner regulations.

The employment of learners pursuant to the provisions of §§ 522.90 to 522.93 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 to 522.9), except to the extent to which any provision of such general regulations is inconsistent with any provision of §§ 522.90 to 522.93.

[22 FR 471, Jan. 24, 1957]

§ 522.91 Applicability of §§ 522.90 to 522.93.

For purposes of §§ 522.90 to 522.93, the luggage, small leather goods and ladies' handbag industries are defined as those industries manufacturing luggage, small leather goods and ladies' handbags.

[22 FR 471, Jan. 24, 1957]

§ 522.92 Issuance of learner certificates.

In the absence of extraordinary circumstances, applications for the employment of learners at wages lower than the statutory minimum wage in these industries shall be denied.

[32 FR 665, Jan. 20, 1967]

§ 522.93 Learner certificates in extraordinary circumstances.

In those cases where extraordinary circumstances are shown to exist, learner certificates for the employment of learners at wages lower than the statutory minimum wage shall be issued in accordance with the provisions of the general learner regulations (§§ 522.1 through 522.9) only after all interested parties have been given opportunity to present their views on the application pursuant to § 522.4.

[32 FR 665, Jan. 20, 1967]

SMALL ELECTRICAL PRODUCTS INDUSTRY

§ 522.100 Applicability of general regulations.

The employment of learners pursuant to the provisions of §§ 522.100 to 522.103 shall be subject to all provisions of the general regulations governing the employment of learners (§§ 522.1 to 522.9), except to the extent to which any provision of such general regulations is inconsistent with any provision of §§ 522.101 to 522.103.

[22 FR 3226, May 8, 1957]

§ 522.101 Applicability of §§ 522.100 to 522.103.

For purposes of §§ 522.100 to 522.103, the small electrical products industry is defined as the industry manufacturing such items as small switches, coils, relays, armatures, transformers, fuses, condensers, capacitors, radio speakers, and antennas.

[22 FR 3226, May 8, 1957]

§ 522.102 Issuance of learner certificates.

In the absence of exceptional circumstances applications for the employment of learners at wages lower than the statutory minimum wage in the small electrical products industry shall be denied.

[32 FR 665, Jan. 20, 1967]

§ 522.103 Learner certificates in exceptional circumstances.

In each case where a prima facie showing of exceptional circumstances is initially made to the Administrator, the applicant will be given an opportunity to demonstrate at a public hearing, by reliable, probative, and substantial evidence, that the denial of the applicant for a special learner certificate will curtail opportunities for employment and that the granting of such certificate will not give a competitive advantage to the applicant or tend to depress working standards for experienced workers in the industry. At the public hearing interested persons will have full opportunity to appear, testify, and conduct such cross-examination as may be required for a full and true disclosure of the facts. In each case in which exceptional circumstances are shown to exist under the standards provided in this section, a special certificate for the employment of learners at wages less than the statutory minimum wage shall be issued in accordance with the provisions of the general learner regulations (§§ 522.1 to 522.9).

[32 FR 665, Jan. 20, 1967]

MEN'S AND BOYS' CLOTHING INDUSTRY

§ 522.104 General denial policy.

All applications for the employment of learners at wages lower than the statutory minimum wage in the men's and boys' clothing industry shall be denied. For the purpose of this section, the men's and boys' clothing industry is defined as the industry which manufactures men's, youths', and boys' suits, coats, and overcoats.]

[32 FR 666, Jan. 20, 1967]

OFFICE AND CLERICAL OCCUPATIONS IN ANY INDUSTRY

§ 522.105 General denial policy.

All applications for the employment of learners at wages lower than the statutory minimum wage in office and clerical occupations in any industry shall be denied.

[32 FR 666, Jan. 20, 1967]

PART 523—EMPLOYMENT OF MESSENGERS

Sec.

523.1 Application for messengers.
523.2 Applications by groups or individuals.
523.3 Consideration on basis of industry.
523.4 Information in applications.
523.5 Hearings.
523.6 Witnesses.
523.7 Burden of proof on applicants.
523.8 Further regulations for certificates.
523.9 Petition for review.
523.10 Petition for amendment of regulations.

AUTHORITY: Sec. 14, 52 Stat. 1068; 29 U.S.C. 214.

SOURCE: 3 FR 2485, Oct. 15, 1938, unless otherwise noted.

§ 523.1 Application for messengers.

Application may be made to the Administrator of the Wage and Hour Division, Department of Labor, Washington, D.C. 20210, to employ messengers to be engaged primarily in delivering letters and messages at a wage lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act of 1938 (52 Stat. 1062; 29 U.S.C. 206) whenever employment at such lower rate is necessary to prevent curtailment of employment opportunities.

[3 FR 2485, Oct. 15, 1938, as amended at 15 FR 603, Feb. 3, 1950]

§ 523.2 Applications by groups or individuals.

Such application may be filed by an employer or employee or group of employers or employees. Preferential considerations will be given, however, to applications filed by groups or organizations which are deemed to be representative of the interests of a whole industry or branch thereof.

§ 523.3 Consideration on basis of industry.

All applications filed under this part will be considered and acted upon on the basis of the needs of the employees and employers in the industry as a whole rather than on the basis of the needs of individual employees or employers in the industry.

§ 523.4 Information in applications.

The application shall:

(a) Identify the industry in which messengers, to be engaged primarily in delivering letters and messages, are requested to be employed at a wage lower than those applicable under section 6;

(b) Set forth the proposed hourly wage rate at which messengers will be compensated;

(c) State why messengers should be employed at a wage less than those applicable under section 6; and

(d) Include any other information believed to be pertinent.

[3 FR 2485, Oct. 15, 1938, as amended at 15 FR 603, Feb. 3, 1950]

§ 523.5 Hearings.

A hearing will be held before the Administrator or his authorized representative on such application at which all interested parties will be afforded an opportunity to present evidence and to be heard. A notice of the time, place, and scope of the hearing will be published in the FEDERAL REGISTER and made public by a general press release at least five days before the date of such hearing.

§ 523.6 Witnesses.

The Administrator shall issue a subpoena for attendance at such hearings to any party upon request and upon a showing of general relevance and reasonable scope of the evidence sought. The Administrator may, on his own motion, or that of his authorized representative, cause to be brought before him or his authorized representative any witness whose testimony he deems material to the matters in issue.

[11 FR 9555, Aug. 30, 1946]

§ 523.7 Burden of proof on applicants.

The applicant or applicants shall have the burden of showing at such hearing that the minimum wage applicable under section 6 will curtail employment opportunities for messengers in the industry designated in the application.

§ 523.8 Further regulations for certificates.

If upon the hearing the Administrator or his authorized representative determines that a lower wage rate than the rate applicable under section 6 is necessary to prevent curtailment of employment opportunities, the Administrator will issue rules and regulations providing for the employment of messengers in the industry under special certificates at such lower wage (subject to such limitations as to time, number, proportion and length of service) as the Administrator or his authorized representative has found to be necessary on the basis of the evidence presented at the hearing.

§ 523.9 Petition for review.

Any person aggrieved by the action of an authorized representative of the Administrator under this part may within fifteen days after the action of such representative file a petition with the Administrator requesting a review by the Administrator of the action of the representative. If the request for review is granted, all interested parties will be afforded an opportunity to be heard either in support or in opposition to the matters prayed for in the petition. A notice of the time and place and scope of the hearing will be published in the FEDERAL REGISTER and made public by general press release at least five days before the date of such hearing.

§ 523.10 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of §§ 523.1-523.9 applicable to messengers may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, both in support and in opposition to the proposed changes.

PART 524—SPECIAL MINIMUM WAGES FOR HANDICAPPED WORKERS IN COMPETITIVE EMPLOYMENT

Sec.

524.1 Applicability of this part.
524.2 Definitions, as used in this part.
524.3 Application for a certificate.
524.4 Special provisions applicable to handicapped trainees.
524.5 Conditions for granting a certificate.
524.6 Additional data when required.
524.7 Issuance of a certificate.
524.8 Terms of a certificate.
524.9 Renewal of a certificate.
524.10 Records to be kept.
524.11 Review.
524.12 Issuance of certificates for experimental purposes.
524.13 Amendment of this part.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214. Interpret or apply sec. 11, 52 Stat. 1066, as amended; 29 U.S.C. 211.

SOURCE: 36 FR 50, Jan. 5, 1971, unless otherwise noted.

§ 524.1 Applicability of this part.

(a) The Fair Labor Standards Amendments of 1966 (Pub. L. 89-601, 80 Stat. 830), among other things, revise the provisions of the Fair Labor Standards Act of 1938 (29 U.S.C. 201) for the competitive employment of handicapped persons at special minimum wages. The provision is now codified at section 14(c) of that Act. It reads in part as follows:

> (c) (1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.
>
> (2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of voca-

tional rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment, at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3) (A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

(b) Paragraphs (2)(A) and (3) (A) and (B) of section 14(c) of the Act quoted above make provision for the employment of individuals whose work is incidental to State agency certified training or evaluation programs or whose productive capacity is inconsequential. Special minimum wages for such persons, which may, when appropriate, be less than 50 per centum of the minimum wage applicable under section 6 of the Act, apply only when they are employed in sheltered workshops under certificates authorized in Part 525 of this chapter.

(c) Under this Part 524, certificates are not issued for less than 75 per centum of the statutory minimum, unless a lower rate is clearly justified, in which case the lowest rate generally that may be authorized is 50 per centum of that minimum. For the multihandicapped and other workers whose earning capacity is severely impaired (referred to in section 14(c) (2)(B) of the Act), a wage lower than 50 per centum of the statutory minimum (but not less than 25 per centum of that minimum) under appropriate circumstances may be authorized after certification by the State agency administering or supervising the administration of rehabilitation services. (Generally, workers with such severely impaired earning capacity are employed in sheltered workshops under certificates authorized in Part 525 of this chapter.)

[36 FR 50, Jan. 5, 1971; 37 FR 9995, May 18, 1972, as amended at 41 FR 29378, July 16, 1976]

§ 524.2 Definitions, as used in this part.

(a) "Handicapped worker" or "worker" means an individual whose earning capacity is impaired by age or physical or mental deficiency or injury for the work he is to perform.

(b) "Handicapped trainee" or "trainee" means an individual whose earning capacity is impaired by age or physical or mental deficiency or injury, and who is receiving or is scheduled to receive on-the-job training in industry under any vocational rehabilitation program administered by the Veterans Administration or an authorized vocational rehabilitation agency operating pursuant to the Vocational Rehabilitation Act, as amended.

(c) "State agency" shall mean the State agency which administers or supervises the administration of vocational rehabilitation services in any State of the United States, the District of Columbia, Puerto Rico, or the territory or possession of the United States in which the employment at special minimum wages is to occur.

(d) "Competitive employment" is employment of a handicapped worker whose earning or productive capacity would yield wages equal to at least 50 per centum of the minimum wage applicable under section 6 of the Act at wage rates which are commensurate with those for nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

[36 FR 50, Jan. 5, 1971; 37 FR 9995, May 18, 1972]

§ 524.3 Application for a certificate.

(a) Application shall be made to the Regional Director of the administrative region of the Wage and Hour Division, U.S. Department of Labor, in which the handicapped worker or handicapped trainee is to be employed. For Puerto Rico, the Virgin Islands, and the Canal Zone, application shall be made to the Caribbean Director in Puerto Rico. Application forms may be obtained from the appropriate Director.

(b) The application shall set forth, among other things, the nature of the disability, a description of the occupation at which the worker is to be employed, and the wage the firm proposes to guarantee the worker per hour. The nature of the disability must be set out in detail. Vague statements such as "nervous condition", "physically incapacitated", "slow worker", etc., are not sufficient.

(c) When a wage is requested which is less than 50 per centum of the minimum wage applicable under section 6 of the Act, the application shall also contain—

(1) Evidence that the individual is multihandicapped or so severely impaired that he is unable to engage in competitive employment as defined in § 524.2(d). For such workers the rate shall be not less than 25 per centum of the statutory minimum.

(2) Such application shall also be certified by the State agency defined in § 524.2(c) that the individual is a multihandicapped individual or other individual whose earning capacity is so severely impaired that he is unable to engage in competitive employment.

(d) The application shall be signed jointly by the employer and worker and be returned to the Regional or District Director by the employer.

(e) No application is required for a temporary certificate for a special minimum wage for a handicapped trainee being trained under any authorized vocational rehabilitation program. Such temporary certificates are issued in accordance with procedures set out in § 524.4.

§ 524.4 Special provisions applicable to handicapped trainees.

(a) Employment of a trainee (pursuant to the Vocational Rehabilitation Act or to a vocational rehabilitation program of the Veterans Administration for veterans with a service-incurred disability) under a temporary certificate or a special certificate shall be governed by this part as modified by this section.

(b) Temporary certificates authorizing the employment of such trainees at wages lower than the minimum wage applicable under section 6 of the Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work may be issued whenever employment at such lower rate is necessary in order to prevent curtailment of opportunities for employment. Such temporary certificates are to be issued by duly designated representatives of State vocational rehabilitation agencies and of the Veterans Administration.

(c) A temporary certificate will designate the employer, the trainee, and the special minimum wage rate. A temporary certificate will be valid for a period not to exceed 90 days from the date of issuance and may not be issued retroactively.

(d) Within 10 days after issuance of a temporary certificate, the supervising rehabilitation agency will forward a copy of the certificate together with a recommendation covering the special minimum rates for the balance of the training period to the appropriate Director of the Wage and Hour Division, U.S. Department of Labor. Such recommendation shall not be for a wage which is less than is authorized pursuant to this § 524.4. The Regional or Caribbean Director, pursuant to this part may then issue a special certificate effective upon the expiration of the temporary certificate, or may terminate the temporary certificate prior to its expiration date, with or without issuing a superseding special certificate. If a temporary certificate is terminated prior to its expiration date without the issuance of a superseding special certificate, written notice of such a termination shall be given the employer, the trainee, and the supervising rehabilitation agency.

(e) When a special certificate authorizing a wage rate of less than 50 per centum of the minimum wage applicable under section 6 of the Act is considered necessary, the State agency or Veterans Administration may request that such certificate be issued by the Wage and Hour Division. Such a request shall be accompanied by supporting information, including certification by the State vocational rehabilitation agency that the handicapped worker is a multihandicapped individual or other handicapped individual whose earning capacity is so severely impaired that he is unable to engage in competitive employment.

(f) Money paid to the trainee by a State vocational rehabilitation agency or the Veterans Administration for maintenance or other expenses shall not be considered as off-setting any part of the wage or other remuneration due the trainee by the employer.

(g) A temporary certificate shall not be issued for a trainee if a satisfactory training opportunity for the desired training is available in the community at the minimum wage applicable under section 6 of the Act or above.

[36 FR 50, Jan. 5, 1971; 37 FR 9995, May 18, 1972]

§ 524.5 Conditions for granting a certificate.

If the application is in proper form and sets forth facts showing: (a) A special minimum wage is necessary to prevent curtailment of the worker's or trainee's opportunities for employment; and (b) the earning or productive capacity of the worker for the work he is to perform is impaired by age or physical or mental deficiency or injury, a certificate may be issued.

§ 524.6 Additional data when required.

To determine whether the facts justify the issuance of a certificate, the Administrator or his authorized representative may require the submission of additional information and may require the worker to take a medical examination.

§ 524.7 Issuance of a certificate.

(a) If the application and other available information indicate that the requirements of this part are satisfied, the Administrator or his authorized representative shall issue a certificate. Otherwise, he shall deny a certificate.

(b) If issued, copies of the certificate shall be transmitted to the employer and the worker or trainee, and, in the case of a certificate for a trainee, to the appropriate vocational rehabilitation agency. If a certificate is denied, the same parties shall be given written notice of the denial.

(c) A certificate may not be issued retroactively.

§ 524.8 Terms of a certificate.

(a) A certificate shall specify, among other things, the name of the worker or trainee, the occupation in which he is to be employed, the special minimum wage rate(s), and the period(s) of time during which such rate(s) may be paid.

(b) A certificate shall be effective for a period to be designated by the Administrator or his authorized representative. Workers or trainees may be paid special minimum wages only during the effective period of the certificate.

(c) The wage rate(s) set in the certificate shall be fixed at a figure designed to reflect adequately the individual worker's or trainee's earning or productive capacity. No wage rate shall be fixed at less than 75 per centum of the applicable minimum wage under section 6 of the Act unless after investigation a lower rate appears to be clearly justified. Such lower rate shall not be less than 50 per centum of the minimum wage applicable under section 6 of the Act, except for individuals certified by the State agency as having earning capacity so impaired that they are unable to engage in competitive employment, but in no event shall such wage rate be less than 25 per centum of the applicable minimum wage under section 6 of the Act nor less than is commensurate with wages paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(d) In an establishment or a vicinity where nonhandicapped employees are employed at piece rates in the same occupation, the handicapped worker or trainee shall be paid at least the same piece rates. The worker or trainee must be paid his full piece rate earnings or the earnings at the hourly rate specified in the certificate, whichever is the greater.

(e) The worker or trainee shall be paid not less than one and one-half times the regular rate at which he is employed for all hours worked in excess of the maximum workweek applicable to him under section 7 of the Act.

(f) No provision of this part, or of any certificate issued under this part, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.

(g) The terms of any certificate, including the wage rate(s) specified therein, may be amended by the Administrator or his authorized representative upon written notice to the parties concerned, if the facts justify such amendment.

§ 524.9 Renewal of a certificate.

(a) Application for renewal of any certificate shall be filed in the same manner as an original application.

(b) If an application for renewal has been properly and timely filed prior to the expiration date of a certificate, the certificate shall remain in effect until the application for renewal has been granted or denied.

§ 524.10 Records to be kept.

Every employer who employs a handicapped worker or handicapped trainee pursuant to these regulations shall keep, maintain, and have available for inspection by the Administrator or his authorized representative a copy of the certificate and all other records required under the applicable provisions of Part 516 (recordkeeping regulations) of this chapter.

§ 524.11 Review.

Any person aggrieved by an action of an authorized representative of the Administrator taken pursuant to this part may, within 15 days after such action, file with the Administrator a petition for review of the action complained of, setting forth grounds for seeking review. If such review is granted, the Administrator or an authorized representative who took no part in the action under review may to the extent he deems it appropriate, afford other interested persons an opportunity to present data and views.

§ 524.12 Issuance of certificates for experimental purposes.

In addition to the issuance of certificates as provided in §§ 524.1 to 524.11, the Administrator may authorize the issuance of certificates to permit employment of handicapped workers at less than the applicable minimum wage under section 6 of the Act as part of experimental programs to increase employment opportunities for such workers. Such certificates shall be issued in such types of cases and on such terms and conditions within the scope of section 14(c) of the Act as the Administrator shall determine will best further any such experimental programs.

[36 FR 50, Jan. 5, 1971, as amended at 41 FR 29378, July 16, 1976]

§ 524.13 Amendment of this part.

The Administrator may at any time upon his own motion or upon written request of any interested person setting forth reasonable ground therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of this part.

PART 525—EMPLOYMENT OF HANDICAPPED CLIENTS IN SHELTERED WORKSHOPS

Sec.

525.1 Applicability of regulations.
525.2 Definitions.
525.3 Advisory Committee on Sheltered Workshops.
525.4 Application for a special certificate for a workshop.
525.5 Application for a special certificate for a training or evaluation program.
525.6 Application for a special individual rate.
525.7 Criteria for consideration in issuance of a special certificate.
525.8 Issuance of special certificates.
525.9 Terms and conditions of special certificates.
525.10 Renewal of special certificates.
525.11 Staff workers in sheltered workshops.
525.12 Industrial homework.
525.13 Records to be kept.
525.14 Cancellation of a special certificate.
525.15 Review.
525.16 Submission of information, investigations, and hearings.

Sec.
525.17 Relation to other laws.
525.18 Issuance of certificates for experimental purposes.
525.19 Amendment of this part.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; (29 U.S.C. 214), unless otherwise noted.

SOURCE: 39 FR 17509, May 19, 1974, unless otherwise noted.

§ 525.1 Applicability of regulations.

The Fair Labor Standards Amendments of 1966 (Pub. L. 89-601, 80 Stat. 830) among other things, makes substantial revision in the provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201) for the employment of handicapped persons at special minimum wages. This provision is now codified at section 14(c) of that act. It reads as follows:

> (c)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age of physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.
>
> (2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—
>
> (A) Handicapped workers engaged in work which is incidental to training or evaluation programs, and
>
> (B) Multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment, at wages which are less than those required by this subsection and which are related to the worker's productivity.
>
> (3) (A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.
>
> (B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

Authority to make the regulations and issue the certificates referred to in section 14(c) has been delegated by the Secretary to the Administrator (General Order No. 45-A of the Secretary of Labor (15 FR 3290)). The regulations in this Part 525 govern all certificates and employment pursuant to certificates authorizing special minimum wages for handicapped workers in sheltered workshops. Certificates for other employers authorizing the employment of handicapped persons at special minimum wages under sections 14(c)(1) and 14(c)(2)(B) are issued pursuant to Part 524 of this chapter.

§ 525.2 Definitions.

(a) "Administrator" means the Administrator of the Wage and Hour Division, U.S. Department of Labor.

(b) "Sheltered workshop" or "workshop" means a charitable organization or institution conducted not for profit, but for the purpose of carrying out a recognized program of rehabilitation for handicapped workers, and/or providing such individuals with remunerative employment or other occupational rehabilitating activity of an educational or therapeutic nature.

(c) "Work activities center" shall mean a workshop, or a physically separated department of a workshop having an identifiable program, separate supervision and records, planned and designed exclusively to provide therapeutic activities for handicapped workers whose physical or mental impairment is so severe as to make their productive capacity inconsequential. Therapeutic activities include custodial activities (such as activities where the focus is on teaching the basic skills of living), and any purposeful activity so long as work or production is not the main purpose. No sheltered workshop or separate department thereof shall qualify as a work activities center if the average productivity per handicapped worker is $1,400 ($1,550 effective January 1, 1979, $1,650 effective January 1, 1980, and $1,775 effective January 1, 1981) or more per year as measured by dividing the total annual earned income of the work program, less the cost of purchased materials used, by the average number of clients in the work program, or, if wage payments are primarily at piece rates, the average annual labor rate per client is $1,000 ($1,100 effective January 1, 1979, $1,175 effective January 1, 1980, and $1,275 effective January 1, 1981) or more as measured by dividing the total annual wages of the clients by the average number of clients in the work program. (The average number of clients shall be determined by taking the average of the total number of clients in the work program on the last day of each quarter in the previous fiscal year, provided such average is representative of the average number of clients employed during the entire year.) No individual worker whose productivity substantially exceeds this average shall be employed at less than the statutory minimum wage under a work activities center certificate. (A handicapped worker, whose productivity substantially exceeds the average, may be certificated under Regulations, Part 524 of this chapter, in rare and unusual cases where necessary to avoid extreme hardship, if he is unable to earn the statutory minimum because of his handicap, and if his production and earnings are included in the averages provided in this paragraph.) Where information is not available for a year, a temporary certificate for not more than 6 months may be issued based on the limited information available, if it is represented that the center expects and has good reason to believe that the conditions hereinabove specified will be satisfied when 1 year's data are available. Information to be considered will include the severity of disability of the handicapped workers employed, or other pertinent factors.

(d) "Handicapped worker" or "client" means an individual whose earning capacity is impaired by age or physical or mental deficiency or injury, and who is being served in accordance with the recognized program of a sheltered workshop within the facilities of such agency or in or about his home.

(e) "State agency" shall mean the State agency which administers or supervises the administration of vocational rehabilitation services in any State of the United States, the District of Columbia, or any territory or possession of the United States.

(f) "Training program" means a program of not more than 12 months' duration, except that longer periods may be approved in unusual circumstances, designed to (1) develop the patterns of behavior which will help a client adjust to a work environment, or (2) teach the skills and knowledge related to a specific occupational objective of a job family, and which meets State agency or equivalent standards.

(g) "Evaluation program" means a program of not more than 6 months' duration, except that longer periods may be approved in unusual circumstances, using the medium of work to determine a client's potential, and which meets State agency or equivalent standards.

(h) "Act" means the Fair Labor Standards Act of 1938, as amended.

(Sec. 11, 52 Stat. 1068; sec. 11, 75 Stat. 74; secs. 501, 602, 80 Stat. 843, 844 (29 U.S.C. 211))

[39 FR 17509, May 19, 1974, as amended at 43 FR 5819, Feb. 10, 1978]

§ 525.3 Advisory Committee on Sheltered Workshops.

(a) The Advisory Committee on Sheltered Workshops appointed periodically by the Secretary of Labor shall advise and make recommendations to the Administrator concerning the administration and enforcement of this part and the need for amendments thereof from time to time and for such other purposes as may be desired by the Administrator.

(b) The Administrator or his authorized representative may notify the Advisory Committee on Sheltered Workshops prior to the denial or cancellation of any special certificate under § 525.8, § 525.10, or § 525.14 and may afford the Committee 15 days, or such additional time as he may allow, to present its views. The Administrator or his authorized representative may also afford the Committee an opportunity to present its views in connection with any petition for review filed under § 525.15, any hearing held under § 525.16, or any petition for amendment of this part filed under § 525.19.

§ 525.4 Application for a special certificate for a workshop.

(a) Application for a special certificate for a workshop, including a work activities center, may be filed by any sheltered workshop with the Regional Director or Caribbean Director of the administrative region or area of the Wage and Hour Division, U.S. Department of Labor, in which the workshop is located. Application forms may be obtained from the appropriate Director.

(b) The application shall contain answers to all of the questions presented on the form, including, among other things, a description of the nature of the disabilities of the persons served by the workshop, a description of the types of employment and the program provided by the workshop, and the earnings of each handicapped worker engaged in work covered by the Act.

(c) The application shall be signed by the president of the board of directors (or corresponding official) and a duly authorized officer of the workshop.

(d) A workshop newly applying for a certificate, which does not have individual earnings records on which to establish an appropriate certificate rate, may be issued a temporary certificate under the terms and conditions applicable to work activities centers if it meets all of the requirements in the definition provided in § 525.2(c) and presents satisfactory evidence that all of its clients will be compensated at wages which are equitable compensation for them.

§ 525.5 Application for a special certificate for a training or evaluation program.

(a) Application for a special certificate for training or evaluation programs may be filed by a sheltered workshop with the appropriate Regional Director (or the Caribbean Director). Application forms may be obtained from the appropriate Director.

(b) The application shall contain answers to all of the questions on the form, including, among other things, evidence of State agency certification that the workshop operates a training or evaluation program as defined in § 525.2 (f) and (g), a description of the services to be rendered, the earnings of the trainees and evaluees engaged in work covered by the Act, and the results obtained with trainees and evaluees who have participated in the programs during the previous year.

(c) The application shall be signed by the president of the board of directors and a duly authorized officer of the workshop.

§ 525.6 Application for a special individual rate.

(a) A workshop may apply with the appropriate Regional Director (or the Caribbean Director) at the time of applying for a certificate, or during the life of a certificate, for an individual rate for a handicapped worker who is unable to earn the applicable certificate rate. Application forms may be obtained from the appropriate Director.

(b) The application shall contain answers to all of the questions presented on the form, including, among other things, information on the nature of the individual's disability, the extent to which it impairs his earning capacity; and justification for a lower individual rate based on productivity records maintained as required under § 525.13(b).

(c) In the case of a request for an individual rate below 50 percent of the statutory minimum applicable under section 6 of the Act, the application in addition shall contain evidence of State agency certification that the individual's earning capacity is so severely impaired that he is unable to engage in competitive employment. Such certification shall be based on an evaluation report made upon recent completion or shortly before such completion of an evaluation or training program as defined in § 525.2 (f) or (g). If an adequate application for an individual rate below 50 percent of the statutory minimum is filed prior to the expiration of the certificate authority of the evaluation or training program, that certificate authority will be continued for the applicant until action is taken on the application. For clients entering a regular work program from a work activities center, a productivity report as required by § 525.13(b) covering the most recent 3-month employment period constitutes an acceptable evaluation report.

§ 525.7 Criteria for consideration in issuance of a special certificate.

(a) The following criteria may be considered by the Administrator or his authorized representative in determining the necessity of issuing a special certificate and the conditions to be specified therein:

(1) The present and previous earnings of handicapped workers of the workshop engaged in work covered by the act;

(2) Whether the individual handicapped workers are being paid wages commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work;

(3) The nature and extent of the disabilities of individuals served by the workshop;

(4) The wages of nonhandicapped employees employed in private industry engaged in work comparable to that performed in the workshop;

(5) The types and duration of medical, education, therapeutic, social work, and other rehabilitative services given to handicapped workers;

(6) The extent to which the handicapped workers share, through wages, in the receipts for work done in the workshop;

(7) The extent to which the handicapped workers may be learners or otherwise inexperienced;

(8) The extent to which earned operating income, other than normal depreciation allowances, is used for capital expenditures for equipment, buildings, or expansion of activities in situations where the adequacy of the wage rates proposed by the workshop cannot clearly be established;

(9) Whether there exists any workshop-customer arrangement or subcontract agreement which constitutes an unfair method of competition in commerce and which tends to spread or perpetuate substandard wage levels;

(10) Whether, in the case of nongovernment operated workshops, the organization has obtained an exemption under section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) and has registered as a nonprofit organization with the appropriate State or local agencies providing for such registration.

(b) In addition, the following criteria will be considered in determining the advisability of issuing a special certificate for a training or evaluation program: (1) Whether there is competent instruction or supervision; (2) whether there is a written curriculum and plan of procedures designed to obtain the objectives of the program; (3) whether there are written records made at periodic intervals of not more than 3 months, showing progress of individual clients; and (4) whether in the case of a training program, there is a progression of rate increases as the trainee successfully advances through the steps of the program, or payment at piece rates. The progression of rate increases should be geared to at least the statutory minimum wage if the worker is being trained for competitive employment, or to at least the certificate rate if he is being trained for workshop employment.

§ 525.8 Issuance of special certificates.

(a) Upon consideration of the criteria specified in § 525.7 and if the requirements of this Part 525 are satisfied, the Administrator or his authorized representative may issue a special certificate.

(b) If a special certificate is issued, a copy shall be sent to the workshop. If denied, the workshop shall be notified in writing of the denial and the reasons therefor.

(c) A special certificate may be issued for the entire workshop, a department of the workshop, a work activities center, a training or evaluation program, and individual handicapped worker or any combination thereof.

(d) No special certificate will be issued pursuant to this Part 525 when abnormal labor conditions, such as a strike, a lockout, or other similar condition, exists at the workshop for which such certificate is requested.

§ 525.9 Terms and conditions of special certificates.

(a) A special certificate shall specify the terms and conditions under which it is granted.

(b) A special certificate shall apply to every handicapped worker in the sheltered workshop or department thereof, for which the special certificate is granted.

(c) A special certificate shall be effective for a period to be designated by the Administrator or his authorized representative. Handicapped workers may be paid wages lower than the statutory minimum only during the effective period of a special certificate.

(d) Except for special certificates for work activities centers and for training or evaluation programs, and unless a lower special individual wage has been authorized on the basis of an application under § 525.6(c), a special certificate shall provide a minimum wage, or different minimum wages for different departments, but none of them shall be less than 50 percent of the minimum wage applicable under section 6 of the Act. It may provide a minimum wage lower than the applicable workshop or department rate, but not less than 50 percent of the minimum wage applicable under section 6 of the Act, for a specified period(s), designated as "learning period(s)." Such rate may apply during the specified learning period(s) to a handicapped worker who has never previously worked in the workshop, or who is transferred to a skilled or semiskilled job in the workshop at which he has never previously worked, or who has returned to the workshop after such period of separation as would require relearning.

(e) A special certificate issued to a work activities center or for a training or evaluation program need not set a minimum wage (other than required in paragraphs (f) and (g) of this section).

(f) The wage rates paid handicapped workers working at time rates shall be commensurate with those paid nonhandicapped workers in the vicinity in industry maintaining approved labor standards for essentially the same type, quality, and quantity of work.

(g) (1) The wage rates paid handicapped workers working at piece rates shall not be less than prevailing piece rates paid nonhandicapped employees in the same work in the vicinity in industry maintaining approved labor standards. In the absence of industry piece rates, time studies or other tests may be used by the workshop to establish piece rates. Such time studies should be made with nonhandicapped persons, although handicapped workers may be used in those situations where they are not handicapped for the type of work being tested and their production is comparable to that of nonhandicapped persons of average ability. The base hourly rate used in making time studies must be not less than the prevailing rate in industry for work requiring similar skill.

(2) Each handicapped worker working at piece rates must be paid his full piece-rate earnings. Pooling of earnings is not permitted except where piece rates cannot be established for each individual worker, e.g., in a team operation where each worker's individual contribution to the finished product cannot be separately tallied.

(h) A special certificate may provide a lower individual minimum wage for a handicapped worker unable to earn the workshop or applicable department minimum wage. Such individual minimum wage may not be set at less than 50 percent of the minimum wage applicable under section 6 of the act, except for a handicapped worker whose earning capacity is so severely impaired that he is unable to engage in competitive employment as certified by a State agency. The individual minimum wage for a handicapped worker so certified may not be less than 25 percent of the minimum wage applicable under section 6 of the act.

(i) Handicapped workers in the workshop shall be paid not less than one and one-half times the regular rate for all work in excess of the minimum workweek applicable under section 7 of the act.

(j) A special certificate shall provide that the workshop may not compete unfairly in obtaining subcontract work or in the sale of its products.

(k) No worker or client shall be hired under a certificate issued under these regulations while abnormal labor conditions, such as a strike, a lock-out, or other similar condition, exists in the workshop.

(l) Each handicapped worker in a workshop shall be informed promptly and in writing of the certificate rate applicable to him and of the terms of the certificate. Such information may be provided by a notice in the handicapped worker's pay envelope, or other suitable method.

(m) The terms of any special certificate may be amended for cause, upon request of the sheltered workshop or handicapped worker, or upon the initiative of the Administrator or his authorized representative.

§ 525.10 Renewal of special certificates.

(a) Application may be filed for renewal of any special certificate.

(b) If an application for renewal has been properly and timely filed prior to the expiration date of a special certificate, the certificate shall remain in effect until the application for renewal has been granted or denied.

(c) Handicapped workers may be paid wages less than the statutory minimum after notice that the application for renewal has been denied, if review of such denial is requested in accordance with § 525.15: *Provided, however,* That if the denial is affirmed on review, the sheltered workshop shall reimburse any person covered by the special certificate in an amount equal to the difference between the applicable minimum wage and any lower wage paid such person subsequent to the effective date of denial.

§ 525.11 Staff workers in sheltered workshops.

No individual who is not a handicapped worker or client within the meaning of § 525.2(d) shall be employed under any special certificate issued pursuant to this part at wages lower than the minimum required under section 6 of the act. Staff jobs are clearly identified as such where the duties include supervision of others or a high degree of responsibility such as office manager, bookkeeper, or truck driver, except that truck drivers may be considered as clients in workshops serving alcoholics where it is the practice to select drivers (also called crew leaders) from among the handicapped workers. Some jobs, such as some office and telephone soliciting jobs, are not clearly either staff or client jobs and may be filed by either depending on the policy and practices of the workshop. Where handicapped worker status is indicated for such borderline workers on an application substantiating information may be requested, such as evidence of the use of screening procedures which are ordinarily required for handicapped workers, such as a medical examination, psychological and aptitude testing, etc., the use of rehabilitation services offered by the workshop, and an attempt by the workshop to place the worker in industry.

§ 525.12 Industrial homework.

A special certificate issued pursuant to this part, authorizes a sheltered workshop to employ a handicapped worker in or about a home, apartment, tenement, or room in a residential establishment without the necessity of obtaining a special industrial homeworker's certificate for such persons under regulations of the Administrator governing the employment of industrial homeworkers; nor shall it be necessary for a sheltered workshop to obtain a special industrial homeworker's certificate for handicapped workers working in or about a home, apartment, tenement, or room in a residential establishment, who are earning the minimum required under section 6 of the Act.

§ 525.13 Records to be kept.

Every sheltered workshop shall maintain and have available for inspection by the Administrator or his authorized representative records of:

(a) Disability, which show the nature of the handicapped worker's disability. Nonobvious disabilities must be substantiated by medical or psychiatric reports or results of psychological tests, as appropriate.

(b) Productivity, which show the productivity of each handicapped worker on a continuing basis or at periodic intervals not exceeding 6 months. Piece rate or other records which show productivity on a continuing basis must also show the average expected production for a nonhandicapped person and either the piece rate paid in commerical industry or the average expected earnings of a nonhandicapped person for the production shown. Where productivity is measured by means of progress reports, records must relate the worker's performance to that of a nonhandicapped person receiving the prevailing wage in industry for similar work or work requiring similar skills. Records of time studies made to establish piece rates must be kept.

(c) Learning periods, when such periods are authorized by the certificate, which show the daily hours worked by each handicapped worker during the learning period(s), and the cumulative total of such hours.

(d) When evaluation or training periods are authorized by the certificate, records designating which workers are evaluees and which are trainees, and the total period of time they have been in such a category.

(e) When a sheltered workshop holds both a work activity center certificate and a regular program certificate, records showing which workers are under each certificate.

(f) Records showing the handicapped workers for whom special individual rates have been authorized.

(g) Pricing of work, which show that part of the unit prices which are allocated to direct labor (labor rate) and the average expected earnings of nonhandicapped workers at a normal expected production rate. Records of time studies made to establish prices must be kept.

(h) Documents relating to State agencies' certification including copies of training or evaluation agreements, authorizations for extensions of such periods, progress reports made during such periods, and evaluation or other reports on which a judgment relating to certification was made.

(i) In addition, the records required under all of the applicable provisions of Part 516 of this chapter, except that any provision pertaining to homeworker's handbooks shall not be applicable to handicapped workers of a sheltered workshop working in or about a home, apartment, tenement, or room in a residential establishment.

(j) Every sheltered workshop having workers who are entitled to benefits under the Act shall at all times post a poster, as prescribed by the Administrator, in a conspicuous place in the workshop where it may be observed readily by the handicapped workers and other workers in the workshop.

(k) Records required by this § 525.13 shall be preserved for a period of at least 2 years.

(Sec. 11, 51 Stat. 1066, as amended; 29 U.S.C. 211)

§ 525.14 Cancellation of a special certificate.

(a) The Administrator or his authorized representative may cancel any special certificate for cause. A special certificate may be canceled (1) as of the date of issuance, if it is found that fraud has been exercised on obtaining the special certificate or in permitting a handicapped worker to work thereunder; (2) as of the date of violation, if it is found that any of the provisions of the Act or of the terms of the special certificate have been violated; or (3) as of the date of notice of cancellation, if it is found that the special certificate is no longer necessary in order to prevent curtailment of opportunities for employment, or that the requirements of this part have not been complied with.

(b) If a petition for review is filed under § 525.15, the effective date of the cancellation shall be postponed until action is taken thereon: *Provided, however,* That if the cancellation order is affirmed on review, the workshop shall reimburse any person covered by the special certificate in an amount equal to the difference between the applicable minimum wage and any lower wage paid such person subsequent to the effective date of cancellation.

(c) Except in cases of willfulness or those in which the public interest requires otherwise, before any special certificate shall be canceled, facts or conduct which may warrant such action shall be called to the attention of the sheltered workshop in writing and it shall be afforded an opportunity to demonstrate or achieve compliance with all lawful requirements.

§ 525.15 Review.

Any person aggrieved by any action of an authorized representative of the Administrator taken pursuant to this part may, within 60 days or such additional time as the Administrator may allow, file with the Administrator a petition for review. Such review, if granted, shall be made either by the Administrator or by an authorized representative who took no part in the action under review, who may, to the extent he deems it appropriate, afford other interested persons an opportunity to present data and views.

§ 525.16 Submission of information, investigations, and hearings.

The Administrator or his authorized representative may require at any time the submission of such information, other than that specified elsewhere in this part, as is deemed appropriate or may conduct an investigation, which may include a hearing prior to taking any action pursuant to this part. To the extent he deems appropriate, the Administrator or his authorized representative may provide an opportunity to other interested persons to present data and views.

§ 525.17 Relation to other laws.

Nothing contained in this part shall be construed as authorizing any act that is contrary to any Federal or State law or municipal ordinance.

§ 525.18 Issuance of certificates for experimental purposes.

In addition to the issuance of certificates as provided in §§ 525.1 to 525.18, the Administrator may authorize the issuance of certificates to permit employment of handicapped workers or clients of a sheltered workshop at less than the applicable minimum wage under section 6 of the Act as part of experimental programs to increase employment opportunities for such persons. Such certificates shall be issued in such types of cases and on such terms and conditions within the scope of section 14 of the Act as the Administrator shall determine will best further any such experimental programs.

§ 525.19 Amendment of this part.

The Administrator may at any time upon his own motion or upon written request of any interested person setting forth reasonable ground therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of this part.

NOTE: Section 50-201.1102 of the Public Contracts Act Regulations (41 CFR Part 50-201) provides that any certificate issued pursuant to Regulations Part 525 authorizing the employment of a handicapped worker under the Fair Labor Standards Act shall constitute authorization for the employment of that worker under the Public Contracts Act in accordance with the terms of the certificate. Certificates authorizing wages below those otherwise required by section 2(a)(1) and 2(b)(1) of the Service Contract Act of 1965 may also be issued under the procedures of Regulations Part 525. (Section 4.6(n)(1) of this Title.)

PART 526—INDUSTRIES OF A SEASONAL NATURE AND INDUSTRIES WITH MARKED SEASONAL PEAKS OF OPERATION

Sec.

526.1 Scope and application.
526.2 Issues.
526.3 Meaning of industry.
526.4 Policies.
526.5 Petitions and requests.
526.6 Initiating proceedings.
526.7 Notice of proceedings.
526.8 Procedures governing oral participation.
526.9 Certification of record.
526.10 Industries of a seasonal nature.
526.11 Industries characterized by annually recurring seasonal peaks of operation.
526.12 Seasonal industries engaged in certain operations on perishable agricultural or horticultural commodities.

AUTHORITY: Sec. 1, 52 Stat. 1060, 29 U.S.C. 201, 207 as amended; General Order No. 45-A of the Sec. of Labor, 15 FR 3290; Reorganization Plan No. 6 of 1950, 3 CFR 1949-53 Comp., p. 1004.

BEST DOCUMENT AVAILABLE

SOURCE: 32 FR 5775, Apr. 11, 1967, unless otherwise noted.

§ 526.1 Scope and application.

(a) The provisions of section 7 of the Fair Labor Standards Act of 1938, as amended, providing partial exemptions from its maximum hours provision for employees in industries found to be of a seasonal nature and for employees in some types of industries found to be characterized by marked annually recurring seasonal peaks of operation, are as follows:

> (c) For a period or periods of not more than 10 workweeks in the aggregate in any calendar year, or 14 workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (d) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) [which prohibits employment for more than specified numbers of hours without specified overtime compensation without paying the compensation for overtime employment prescribed in such subsection if such employee (1) is employed by such employer in an industry found by the Secretary to be of a seasonal nature, and (2) receives compensation for employment by such employer in excess of 10 hours in any workday, or for employment by such employer in excess of 50 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.
>
> (d) For a period or periods of not more than 10 workweeks in the aggregate in any calendar year, or 14 workweeks in the aggregate in the case of an employer who does not qualify for the exemption in subsection (c) of this section, any employer may employ any employee for a workweek in excess of that specified in subsection (a) [which prohibits employment for more than specified numbers of hours without specified overtime compensation without paying the compensation for overtime employment prescribed in such subsection, if such employee—
>
> (1) Is employed by such employer in an enterprise which is in an industry found by the Secretary—
>
> (A) To be characterized by marked annually recurring seasonal peaks of operation at the places of first marketing or first processing of agricultural or horticultural commodities, from farms if such industry is engaged in the handling, packing, preparing, storing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, or
>
> (B) To be of a seasonal nature and engaged in the handling, packing, storing, preparing, first processing, or canning of any perishable agricultural or horticultural commodities in their raw or natural state, and
>
> (2) Receives compensation for employment by such employer in excess of 10 hours in any workday, or for employment in excess of 48 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(b) The authority to make the findings contemplated by section 7(c) and 7(d) of the Act has been delegated to the Administrator of the Wage and Hour Division (hereinafter called the Administrator). Each of these exemptions shall apply only to those industries which are the subject of currently effective findings.

(c) The regulations in this Part 526 set forth the general policies which will be observed by the Administrator in making, modifying, and revoking the findings on which the exemptions provided in sections 7(c) and 7(d) of the Act depend, provide the procedures whereby the requisite findings are made, amended, and revoked, and publish the findings on which the exemptions provided in sections 7(c) and 7(d) of the Act depend provide the procedures whereby the requisite findings are made, amended, and revoked, and publish the list setting forth each industry for which there exists a currently effective finding resulting in an exemption of either or both types for it.

§ 526.2 Issues.

The exemptions provided in the statutory provisions quoted in § 526.1(a) present three questions of fact which are relevant to the issue whether either or both exemptions has application to a particular industry. They are stated in paragraphs (a), (b), and (c) of this section.

(a) Is the industry of a seasonal nature?

(b) Is the industry engaged in the handling, packing, storing, preparing, first processing, or canning of perishable agricultural or horticultural commodities in their raw or natural state?

(c) If the industry is not of a seasonal nature, is it characterized by marked annually recurring seasonal peaks of operation at the places of first marketing operation at the places of first marketing or first processing of perishable agricultural or horticultural commodities from farms?

(d) A determination that an industry qualifies for the exemption in section 7(c) or 7(d) depends upon affirmative answers to the questions stated in paragraphs (a), (b), and (c) of this section. Affirmative answers to both the questions presented in paragraph (a) and paragraph (b) of this section will result in a determination that both exemptions apply, and listing the industry in § 526.12. Affirmative answer to the question presented in paragraph (a), with negative or no answer to the question presented in paragraph (b), will result in a determination that the exemption provided in section 7(c) of the Act has application, but the exemption provided in section 7(d) of the Act does not, and listing the industry in § 526.10. Affirmative answers to the questions presented by paragraphs (b) and (c), with negative or no answer to the question presented in paragraph (a), will result in a determination that the exemption provided in section 7(d) of the Act, but not the one provided in section 7(c) of the Act, has application, and listing the industry in § 526.11.

§ 526.3 Meaning of industry.

(a) The term "industry" as used in this part means a trade, business, industry, or branch thereof, or group of industries in which individuals are gainfully employed.

(b) In determining whether the operations for which exemption is sought constitute an industry or a separable branch of an industry, the following factors, among others, may be considered: The extent to which the activity carried on and the products under consideration are distinguishable from other activities and products, the geographical locations of the operations, the comparability of techniques and physical facilities with those found in other situations, the extent of integration with other operations, the extent of separation of employees performing the operations involved, established classifications in the industry, and any competitive factors involved.

(c) Affirmative findings on questions presented in § 526.2(a), (b), and (c), whenever made by the Administrator as provided in this part, will define and delimit the scope of the industry to which they apply. No exemption under section 7(c) or 7(d) of the Act which is dependent on any such finding may be taken with respect to any employee in a workweek when he is employed in any enterprise, operation, or activity not included in the scope of such industry as thus defined and delimited.

§ 526.4 Policies.

(a) *Industries of a seasonal nature.* The Administrator will find an affirmative answer to the question presented in § 526.2(a) if the industry:

(1) Engages in handling, extracting, or processing materials during a season or seasons in a regularly, annually recurring part or parts of the year not substantially greater than 6 months, and ceases production, apart from work such as maintenance, repair, clerical, and sales work, in the remainder of the year, because of the fact that, by reason of climate or other natural conditions, the materials handled, extracted, or processed, in the form in which such materials are handled, extracted, or processed, are not available in the remainder of the year, or

(2) It engages in the handling, preparing, packing, or storing of agricultural commodities in their raw or natural state, and receives 50 percent or more of the annual volume of the products on which its operations are performed in a period or periods amounting in the aggregate to not more than 14 workweeks.

(b) *Perishable agricultural or horticultural commodities.* Pending revision of Part 780 of this chapter responsive to the Fair Labor Standards Amendments of 1966, the Administrator will be guided in finding the answers to the question presented by § 526.2(b) by the principles expressed in the following sections of Part 780 of this chapter where applicable: Handling, § 780.727 through § 780.729; packing, § 780.731; preparing, § 780.742; storing, § 780.732 and

§ 780.733; canning, §§ 780.758 through 780.764, and 780.950; first processing, § 780.951; and raw or natural state, § 780.743.

(c) *Seasonal peaks of operation.* The Administrator will find an affirmative answer to that portion of the question presented by § 526.2(c) requiring that there be seasonal peaks of operation if, in the industry as a whole, or typically in the establishments therein, there is a period or periods of not less than 1 month nor significantly greater than 3 months during each calendar year in which operations of the establishments in the industry must be adjusted to care for a seasonal influx of commodities in their raw or natural state which is substantially greater in volume than the average inflow of such commodities in the other months of the year. Pending revision of Part 780 of this chapter responsive to the Fair Labor Standards Amendments of 1966, the principles expressed in the following sections of that part, to the extent applicable, will guide the Administrator in applying the terms of the remaining portion of the question presented in § 526.2(c): First marketing, § 780.416; first processing, §§ 780.951 and 780.415; agricultural and horticultural commodities, §§ 780.121, 780.709 through 780.714; and from farms, § 780.414.

§ 526.5 Petitions and requests.

Any person may file with the Administrator of the Wage and Hour Division of the U.S. Department of Labor, 14th Street and Constitution Avenue NW., Washington, D.C. 20210, a written petition to initiate proceedings to make, amend, or revoke findings with reference to a defined industry on the questions presented by § 526.2 (a), (b), and (c) and the responsive lists of exempt industries in §§ 526.10, 526.11, and 526.12.

§ 526.6 Initiating proceedings.

(a) The Administrator will consider every petition submitted pursuant to § 526.5. He will initiate proceedings in accordance with this part whenever he determines that such action is justified, and before any change is made in the lists provided in §§ 526.10, 526.11, and 526.12.

(b) The Administrator may also initiate proceedings on his own motion in accordance with this part.

§ 526.7 Notice of proceedings.

Notice of the initiation of proceedings shall be published in the FEDERAL REGISTER. Such notice will (a) refer to section 7(c) or section 7(d) or both such sections of the Fair Labor Standards Act of 1938 (20 U.S.C. 207 (c) and (d)), Reorganization Plan No. 6 of 1950 (3 CFR 1949-53 Comp., p. 1004), and General Order No. 45-A of the Secretary of Labor (15 FR 3290) as authority for the proposal and direct attention to this Part 526 of Title 29 of the Code of Federal Regulations governing the procedure, (b) contain the terms or substance of the proposed finding, or a statement of the subjects and issues involved, and (c) invite interested persons to participate in the proceedings through the submission of pertinent written data, views, and arguments, specifying the time and place for such submissions. If the Administrator decides that the opportunity for written participation is to be supplemented with an opportunity for oral participation a time and place shall also be specified or oral submissions of evidence.

§ 526.8 Procedures governing oral participation.

Such oral submissions as may be invited by the notice shall be heard at proceedings presided over by an examiner appointed under section 11 of the Administrative Procedure Act. Submissions pursuant to § 526.7 shall be made available for inspection by those participating. Such proceedings shall be reported, and transcripts made available to interested persons on such terms as the hearing examiner may provide. Any pertinent investigations or studies made by the Wage and Hour Division and the support any proposal it may make shall be presented, through witnesses supplied by the Divisions, by an attorney assigned by the Solicitor of Labor, who may call and examine such other witnesses and undertake such cross examination of witnesses called by others, as may seem appropriate. Subject to such limitations as the hearing examiner may impose to expedite the proceedings, limit the record, and confine it to pertinent matter, every interested person in attendance or represented at the proceedings shall have the opportunity to give evidence through witnesses he may produce, cross examine witnesses produced by others, and make argument based on all the evidence received. The hearing examiner shall regulate the course of the proceedings and dispose of procedural requests, objections, and comparable matters. He shall have power, in his discretion, to administer oaths and affirmations, to enforce his decisions by governing the content of the record and by excluding persons from the room where evidence is received whose presence he considers inappropriate, and to keep the record open for a reasonable stated time after the oral presentations to receive written proposals and supporting reasons, based on the record of the proceedings, from those who have participated in making it.

§ 526.9 Certification of record.

Following the close of the record of any oral proceeding held pursuant to §§ 526.6 and 526.7, the hearing examiner shall certify to the Administrator the transcript of the proceeding, all exhibits received in evidence, and any proposals and supporting reasons that may have been filed pursuant to leave granted at the proceeding, together with any comments he may deem helpful concerning any issue as to credibility of witnesses that may have developed at the proceeding. Following receipt of all written data, views, or argument submitted in accordance with a notice provided in § 526.7 and certification of the record of any oral proceeding held pursuant to § 526.7 and § 526.8, the Administrator shall consider all relevant material presented together with such other pertinent information as may be available to him, and find the answers to the questions listed in § 526.2 which are presented for decision. The Administrator's decision will be expressed in a document signed by him and published in the FEDERAL REGISTER making any necessary amendments to the lists provided in §§ 526.10, 526.11, and 526.12. Such document will incorporate a concise statement of its basis and purpose, and, except to the extent that it relieves a restriction, shall provide an effective date for the change not less than 30 days after the date of publication in the FEDERAL REGISTER, unless a shorter time is provided for good cause found and expressed in the document.

§ 526.10 Industries of a seasonal nature.

(a) *General.* (1) The industries listed in paragraph (b) of this section have been found to be of a seasonal nature within the meaning of section 7(c) of the Fair Labor Standards Act of 1938, as amended, but have not been found to qualify for the exemption in section 7(d) of such Act. An employer operating an establishment in an enterprise in any such industry in which operations named in the findings are carried on may select the workweeks (not more than 14) in each calendar year in which the partial overtime exemption provided by section 7(c) will be applied to employees in such establishment. (See § 516.18 of this chapter.) During each of the workweeks thus selected, any employee may be employed by an employer in such establishment without payment of the overtime compensation prescribed by section 7(a) of the Act, if such employee is not employed in any nonexempt work outside the scope of the industry and is paid overtime compensation at a rate not less than one and one-half times the regular rate at which he is employed for all hours worked in such workweek in excess of 10 in any workday or in excess of 50 in any workweek, whichever is greater. No employer, however, is permitted to employ any employee under the special provisions of section 7(c) in any industry in the following list for more than 14 workweeks in any calendar year.

(2) The definitions in paragraph (b) of this section include the findings of seasonality made under former section 7(b) (3) of the Fair Labor Standards Act of 1938 (52 Stat. 1063), which are continued.

(b) *Industries found to be seasonal in nature, name and definition*—(1) *Alfalfa and coastal bermuda grass (ar-*

tificial drying, subsequent manufacture of meal, and the making of dehydrated pellets). Dehydrating alfalfa and coastal bermuda grass and subsequent manufacture of meal therefrom, and the following operations when performed at dehydrating plants during the period or periods when dehydrating operations are carried on: The making of dehydrated alfalfa and coastal bermuda grass pellets containing not more than 20 per centum of ingredients other than alfalfa and coastal bermuda grass, including pelleting alfalfa and coastal bermuda grass dehydrated at other plants in any workweek when such pelleting constitutes no more than 20 per centum of the pelleting volume; and any operations necessary or incidental to the foregoing.

(2) *Almond Hulling Industry.* The hulling of almonds including any operation necessary or incidental thereto.

(3)-(4) [Reserved]

(5) *Citrus pulp and waste dehydrating in Texas.* In Texas, the dehydration of citrus pulp and waste and the manufacture of cattle feed therefrom.

(6) *Clay products, brick manufacturing branch, Maine, Vermont, and New Hampshire.* Manufacture of brick in Maine, Vermont, and New Hampshire.

(7) *Cotton ginning.* Includes the following operations, when performed during the period or periods when cotton is being received for ginning: the receiving of seed cotton at the gin, the handling, cleaning, ginning, and baling of the cotton, the handling of the baled cotton and cottonseed, and any operations or services necessary or incident to the foregoing, including the placing of the cotton and cottonseed in storage or transportation facilities on or near the premises.

(8) *Cotton storing and compressing.* Includes the receiving, handling, and storing of raw cotton and the compressing of raw cotton when performed at a cotton warehouse or compress-warehouse facility other than one operated in conjunction with a cotton mill. Also included are any operations incident to the foregoing such as loading, unloading, weighing, sampling, assembling, and preparing for shipment when performed at the storing establishment.

(9) *Crushed stone, northern branch.* The blasting and excavating of stone for crushing from surface or open cuts, the transportation, handling, and crushing of such stone, and the sizing, washing, and grading of crushed stone, together with other necessary processing incidental thereto. The northern branch of the crushed stone industry shall include all plants located in counties in states that lie within the isothermic belt below 25° Fahrenheit or are touched by the 25° isotherm. The said counties and States are:

(i) Iowa, Maine, Minnesota, Montana, New Hampshire, North Dakota, South Dakota, Utah, Vermont, Wisconsin, and Wyoming: All counties.

(ii) All the counties in the following States, except those counties enumerated:

(*a*) *Colorado.* All the counties in Colorado except the counties of: Adams, Arapahoe, Baca, Bent, Cheyene, Crowley, Denver, Douglas, Elbert, Kiowa, Kit Carson, Lincoln, Logan, Morgan, Otero, Phillips, Prowers, Pueblo, Sedgwick, Washington, Weld, and Yuma.

(*b*) *Connecticut.* All the counties in Connecticut except the counties of: Middlesex, New London, Tolland, and Windham.

(*c*) *Idaho.* All the counties in Idaho except the counties of: Ada, Benewah, Canyon, Gooding, Jerome, Latah, Lewis, Lincoln, Minidoka, Nez Perce, Owyhee, Payette, and Twin Falls.

(*d*) *Michigan.* All the counties in Michigan except the counties of: Berien and Monroe.

(*e*) *Nebraska.* All the counties in Nebraska except the counties of: Adams, Banner, Buffalo, Chase, Cheyenne, Clay, Dawson, Deuel, Dundy, Franklin, Frontier, Furnas, Gosper, Hall, Harlan, Hayes, Hitchcock, Jefferson, Kearney, Kimball, Nuckolls, Pawnee, Perkins, Phelps, Redwillow, Richardson, Thayer, and Webster.

(*f*) *New York.* All the counties in New York except the counties of: Genesee, Monroe, Nassau, Niagara, Orleans, Rockland, Seneca, Suffolk, Wayne, Westchester, and all the counties of the City of New York.

(iii) The following counties in the following States:

(*a*) *Illinois.* Boone, Bureau, Carroll, Cook, DeKalb, Du Page, Henderson, Henry, Jo Daviess, Kane, Kendall, Knox, Lake, LaSalle, Lee, McHenry, Marshall, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, and Winnebago.

(*b*) *Indiana.* Allen, DeKalb, Elkhart, Kosciusko, Lagrange, Marshall, Noble, St. Joseph, Steuben, and Whitley.

(*c*) *Massachusetts.* Berkshire, Franklin, Hampden, Hampshire, Middlesex, and Worcester.

(*d*) *Missouri.* Atchison, Gentry, Harrison, Holt, Mercer, Nodaway, Putnam, Schuyler, Scotland, Sullivan, and Worth.

(*e*) *Nevada.* Elko, Eureka, and White Pine.

(*f*) *New Mexico.* Colfax, Nora, Rio Arriba, Santa Fe, and Taos.

(*g*) *Ohio.* Williams.

(*h*) *Oregon.* Baker, Clackamas, Deschutes, Grant, Hood River, Jefferson, Lane, Linn, Marion, Umatilla, Union, and Wasco.

(*i*) *Pennsylvania.* Bradford, Erie, Lackawanna, McKean, Pike, Potter, Susquehanna, Tioga, Warren, Wayne, and Wyoming.

(*j*) *Washington.* Chelan, Ferry, King, Kittitas, Lewis, Okanogan, Pend Oreille, Pierce, Swagit, Skamania, Snohomish, Spokane, Stevens, Whatcom, and Yakima.

(iv) *Supplementary determinations.* This determination shall be without prejudice to a supplementary determination enlarging the scope of the northern branch by the inclusion therein of such plants or groups of plants, if any, as operate in the same manner and for the same reasons as the plants in the northern branch described above. Supplementary determinations for the following plants have also been determined to be within the northern branch of the crushed stone industry and thus entitled to the section 7(c) exemption:

(*a*) The Gottron Bros., Sandusky County, Ohio. [No. 1]

(*b*) Kelley Island Lime and Transport Co., Erie County, Ohio. [No. 2]

(*c*) T. P. Rogers Stone Co., Monroe County, Pa. [No. 3]

(*d*) LeRoy Lime and Crushed Stone Corp., Genesee County, N.Y. [No. 4]

(*e*) General Crushed Stone Co., Genesee County, N.Y. [No. 5]

(*f*) General Crushed Stone Co., Luzerne County, Pa. [No. 6]

(*g*) Coon Certified Concrete, Luzerne County, Pa. [No. 7]

(*h*) Abram Cleason, Wayne County, N.Y. [No. 8]

(*i*) Genesee Stone Products Corp., Genesee County, N.Y. [No. 9]

(*j*) Rowe Contracting Co., Suffolk and Middlesex Counties, Mass. [No. 10]

(*k*) Suffern Stone Co., Rockland County, N.Y. [No. 12]

(*l*) Warren Brothers Roads Co., Bristol County, Mass. [No. 13]

(10) *Decorative greens, certain branches.* (i) The harvesting and preparing of undried evergreens, including both evergreens and deciduous holly but excluding evergreen huckleberry and evergreen ferns in the State of Washington, for use as Christmas trees, wreaths, decorative boughs, ropings, grave blankets, sprays, bouquets, and baskets, including the incidental handling and shipping thereof; and

(ii) The processing of coniferous evergreen trees into Christmas trees, including the handling and shipping incident thereto; and

(iii) The processing of undried, evergreen holly, including handling and shipping incident thereto except when such processing is conducted as part of the florist supply business which operates throughout the year.

(11) *Flax straw, unloading, weighing, loading, handling, baling and storage: Minnesota, North Dakota, South Dakota, and Iowa.* In the States of Minnesota, North Dakota, South Dakota, and Iowa the receiving of the bales at the storage yards; stacking the bales; rebaling of broken bales; unloading, weighing, loading, and handling at temporary gathering points; and any operations performed at the storage yards or temporary gathering points which are necessary and incident to the foregoing.

(12) *Fur, raw, receiving.* Includes the receipt, accounting or handling in raw fur receiving houses as herein defined, of domestic raw furs in the primary state.

(i) "Raw fur receiving houses," as used herein, shall include any establishment which during any raw fur season, namely from November 25 in any year to March 15 in the succeeding year, both dates inclusive, purchases or receives on consignment, domestic raw furs in the primary state, as herein defined, on which furs all but an insubstantial amount of their labor is employed during such raw fur season, as evidenced by the fact that the total purchase price or consigned price of the primary fur equals at least 75 percent of the total purchase price of all raw furs purchased by such establishment during such raw fur season.

(ii) The term "domestic furs" or "domestic raw furs," as used herein, shall include United States and Canadian furs.

(iii) The term "raw furs in the primary state," as used herein, shall mean all domestic furs which require prompt handling, in order to determine their grade and their need for further treatment, before they can be purchased, stored, sold or reconsigned as "raw furs."

(iv) The term "handling" as used herein, shall include opening, counting, spreading, examining, grading, sorting, mailing, valuing, scraping, stretching, drying, packing, preserving, or other related processes.

(13) *Gold, placer, open-cut mining: Alaska.* Open-cut mining of placer gold by hand and power machinery in Alaska.

(14) *Grain; flaxseed, buckwheat, soybeans, rough rice: Storing and drying before storage in country grain elevators, public terminal and subterminal grain elevators, wheat flour mill elevators, nonelevator type bulk storage establishments, and flat warehouses.* Includes the operations of storing and drying prior to storage of grain, flaxseed, buckwheat, soybeans, and rough rice, and any operations necessary or incident to such storing and drying, including: Receiving, unloading, weighing, testing, cleaning, mixing, fumigating, shelling corn, sacking, and removing these commodities from storage, during the period or periods when the commodities are being received, dried, or stored. The term "nonelevator type bulk grain storing establishments" includes warehouses, quonset huts, barns, steel tanks, tents, and other similar storage facilities which are used to store grain, whether operated in conjunction with an elevator to supplement the elevator's storage space or operated as independent establishments. "Flat warehousing" means the storing of grain in sacks.

(15) [Reserved]

(16) *Ice, natural, harvesting and packing.* Harvesting and packing of natural ice.

(17) *Landscape contracting (except in California, Oregon, and Washington).* Includes except in the States of California, Oregon, and Washington, the planting or transplanting of trees, shrubs, and other plants, including the making of lawns and gardens and the necessary coincidental building, on the site, of garden retaining walls, rock gardens, etc. It does not include routine lawn or garden maintenance except as an incident to the above during the planting season or seasons.

(18) *Lumber: Ice and snow road hauling branch, Maine, Massachusetts, New Hampshire, Pennsylvania, Vermont, Michigan, Minnesota, Wisconsin, and New York.* The hauling on ice and snow roads of sawtimber and pulpwood in the States of Maine, Massachusetts, New Hampshire, Pennsylvania, Vermont, Michigan, Minnesota, Wisconsin and New York.

(19) *Pulpwood sap peeling branch.* The felling, trimming and peeling of pulpwood trees while the sap is running, including the operations of bucking and piling if performed during the sap peeling season wherever conducted.

(20) *Spring freshet driving branch: United States.* The spring freshet driving of lumber in the United States.

(21) *Meatcuring and packing (Virginia-Smithfield).* The curing and packing of Virginia-Smithfield cured meats by the Virginia-Smithfield meat packers.

(i) As used herein, "Virginia-Smithfield cured meats" means those cured from the peanut-fed hog by the long process, nonrefrigerated meat curing methods.

(ii) "Virginia-Smithfield meat packers" as used herein means those establishments engaged solely, or almost solely in the curing of meats from peanut-fed hogs by the long process, nonrefrigerated meat curing methods in the peanut belt of eastern Virginia.

(22) *Peanut handling, packing, shelling, etc.* The storing of peanuts in warehouses (other than mill warehouses) which store unshelled peanuts exclusively or substantially exclusively.

(23) *Peat materials, production, northern branch.* Excavating, mascerating, spreading, cutting, or drying of peat materials in the northern branch of the industry, including Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Ohio, Michigan, Wisconsin, Minnesota, Illinois, Iowa, Indiana, North Dakota, South Dakota, Colorado, Utah, Nevada, Montana, Idaho, Oregon, Washington, and Modoc County, Calif.

(24) *Pecan packing.* The packing of unshelled paper shell or improved varieties of pecans.

(25) *Rabbits, wild and other wild fur-bearing animals, skinning of.* The skinning of wild rabbits and other wild fur-bearing animals such as skunk, muskrat, mink, and beaver, in wild rabbit skinning establishments during the wild rabbit skinning season, including the operations of collecting or receiving the carcasses of these animals, or occasionally, the pelts of these animals which have not been cleaned, scraped or dried, and it includes the removing of the pelts from carcasses, cleaning, scraping, and drying the pelts, baling the pelts for shipment and all operations immediately necessary and incident to these enumerated operations. It does not include these operations when performed on domesticated rabbits or other fur-bearing animals raised in captivity.

(26) *Sand and gravel, northern branch.* The excavation of sand and gravel, but not industrial sand, from open cuts, including necessary milling operations incident thereto, in plants located in counties that lie within the isothermic belt below 25° Fahrenheit or are touched by the 25° isotherm. These counties are enumerated in the industry of a seasonal nature determination for crushed stone, northern branch, supra, in this section. This determination shall be without prejudice to a supplementary determination enlarging the scope of the northern branch by the inclusion therein of such plants or groups of plants, if any, as operate in the same manner and for the same reasons as the plants in the northern branch described above. Pursuant to this determination the following plants have also been determined to be within the northern branch of the sand and gravel industry and thus entitled to the section 7(c) exemption:

(i) Portland Sand and Gravel Co., Northampton County, Pa. [Supplementary Determination No. 1]

(ii) J. C. O'Connor & Sons, Miami County, Ind. [No. 2]

(iii) Klamath Concrete Pipe Co., Klamath County, Oreg. [No. 3]

(iv) Kickapoo Sand and Gravel Co., Inc., Peru, Ind. [No. 4]

(27) *Seed*—(i) *Garden seed and seed corn, cleaning and preparing.* The cleaning and preparing of garden seed and seed corn at country cleaning plants.

(*a*) "Cleaning and preparing" consists of receiving of the seed crop into the cleaning plant and the cleaning, purifying, sorting, drying, grading, and otherwise rendering such crop suitable for seed. It may include the bulk packaging of seed for delivery to a central point of distribution.

(*b*) "Country cleaning plants" are those establishments wherein the seed crop is received direct from farmers (and no part of which is shipped from other plants) and is cleaned, purified, sorted, dried, graded, and otherwise rendered suitable for seed.

(ii) *Grass, clover, and other forage seed crops, cleaning and preparing.* The receiving, cleaning and preparing of all varieties of alfalfa, Austrian winter peas, bermuda grass, bent grass, bluegrass, clover, cow peas, fescue, grain sorghum, lespedeza, lupine, orchard grass, redtop, ryegrass, sudan grass, sugar beet, vetch, and wheat grass seeds by country cleaning plants primarily engaged in such cleaning and preparing, and at bluegrass seed curing yards; the receiving, cleaning and preparing of other kinds of seeds by such plants; and any operations or services necessary or incident to the foregoing, including packing and shipping, during the period or periods when seeds are being received, cleaned, and prepared. For the purpose of this determination, the term "cleaning and preparing" means curing, cleaning, purifying, sorting, drying, grading and otherwise conditioning seed for planting purposes. The term "country cleaning plant primarily engaged in such cleaning and preparing" means a seed cleaning and preparing establishment in which all the seeds cleaned and prepared are received directly from farmers or farm assemblers (and no part of which is shipped from other cleaning plants), and in which the specifically named seeds either individually or in combination constitute 75 percent or more of the seeds cleaned and prepared.

(iii) *Hybrid corn, processing.* Husking, sorting, drying, shelling, grading, and sacking of hybrid seed corn, in plants which engage in no other operations.

(28) *Sorgo processing into sorgo syrup in Iowa.* The receiving, handling, unloading, and weighing of sorgo at the processing establishment; the preparation of the sorgo for grinding by removing the leaves and seed heads; the extraction of the juice from the sorgo; the processing of the juice into sorgo syrup; and the following operations when performed at or near the sorgo processing plant by employees of the processor during the period of seasonal operations: Packing the syrup into containers and labeling the packages; the removal, handling, and conveying of the packages of sorgo syrup to trucks or other means of transportation in the vicinity of the plant; the removal, conveying, burning, packing, baling, piling and storing in bags or in baled forms of bagasse resulting from the processing of sorgo into sorgo syrup; and any operations necessary or incident to the foregoing in the State of Iowa. The term "processing of sorgo into sorgo syrup" does not include operations performed on syrups other than sorgo, or the blending or mixing of such other syrups with sorgo syrup.

(29) *Soybeans: Handling by cottonseed crushing mills.* The unloading, weighing, placing into storage, storing, and handling of soybeans in cottonseed crushing mills and any operations or services necessary or incident to the foregoing, including incidental selling and shipping, during the period or periods when soybeans are being received for storage or handling.

(30) *Sugar*—(i) *Beet sugar.* Receiving the sugar beets at the factory site or at receiving stations operated by the beet sugar factory; the transporting of the beets from such receiving stations to the factory when performed by employees of the sugar beet processor; the production of sugar from the beets and the further extraction of sugar from sugar beet molasses by mixing and concurrently processing the molasses with the beet juice obtained directly from the sugar beets; and the following operations when performed by employees of the sugar beet processor on or near the premises of the beet sugar plant while the sugar beets are being received at the factory or are being processed into sugar: The powdering of sugar; the compressing and artificial drying of wet beet pulp; the weighing, handling, packaging, bagging, and storing of sugar, wet beet pulp, dried beet pulp and molasses; the removal of these products from the premises and placing them in transportation facilities; and any operation or services necessary or incident to the foregoing, such as the testing of the equipment, maintenance, repairs, clerical work or sales work. The term "beet sugar industry" does not include the quarrying of lime, the manufacture of bags or other sugar containers, or the manufacture of yeast, citric acid, or any other byproducts not specifically included in this definition.

(ii) *Cane sugar: Processing and milling branch, Louisiana.* The unloading of sugarcane at the mill; the processing of sugarcane into sugar, syrup and molasses; and the following operations when performed on the premises of a sugarcane processing mill while the sugarcane is being processed; the immediate refining, as one of a connected series of operations, of raw sugar produced from sugarcane ground on the premises; the refining, by the introduction into such series of operations, of raw sugar which has been produced during the same grinding season in other Louisiana cane processing plants of the employer, except in establishments where the refined sugar made from such transferred raw sugar constitutes half or more of the refined sugar produced during the cane processing season, or where purchased raw sugar, or raw sugar produced outside of Louisiana, is refined during the cane processing season; the burning, removing from the premises, or dehydrating of bagasse resulting from the processing of sugarcane; the extraction of calcium aconitate from "B" molasses, including, the drying of the cake; the handling, baling, bagging, packing and storing of the sugar, syrup, molasses, bagasse, or calcium aconitate, and any operations necessary and incident to the foregoing, including the placing of these products in storage or transportation facilities on or near the premises.

(31) *Timber operations involving Lodgepole pine, etc., in States of Colorado, Wyoming, and Utah.* Includes the logging and reducing to usable form in the woods of Lodgepole pine, Engelmann spruce, and commonly associated species of timber in the States of Colorado, Wyoming, and Utah, and also includes the hauling of the logs from the woods to the sawmill, or the delivery of the logs or rough manufactured products from the woods to local markets or shipping points. The treating and further processing of such logs or rough manufactured products is not included.

(32) *Tobacco*—(i) *Auction and loose leaf branch using leaf tobacco of types 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, and 37.* The operations of the auction on loose leaf tobacco warehouse industry, consists of the services necessary and incidental to the sale at auction of green leaf tobacco of types 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, and 37 (as defined by the Bureau of Agricultural Economics of the U.S. Department of Agriculture) in some instances including stripping the tobacco from the stalk and the grading thereof.

(ii) *Green leaf, buying, handling, stemming, redrying, packing, and storing of types 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, and 37.* The buying, handling, stemming, and redrying of green leaf tobacco of types 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, and 37 (as defined by the Bureau of Agricultural Economics of the U.S. Department of Agriculture) and the packing and storing thereof.

(iii) *Green leaf, buying, handling, sorting, grading, packing, and storing of type 32.* The buying, handling, sorting and grading of green leaf tobacco of type 32 (as defined by the Bureau of Agricultural Economics of the U.S. Department of Agriculture) and the packing and storing thereof.

(iv) *Cigar leaf tobacco, buying, handling, stripping, sorting, grading, sizing, packing, and stemming prior to packing type 41-45, 51-55, 61, and 62.* The buying, handling, stripping, sorting, grading, sizing, packing, and in the stemming prior to packing, of perishable cigar leaf tobacco of types 41-45, 51-55, 61, and 62 (as defined by the Bureau of Agricultural Economics of the U.S. Department of Agriculture).

(33) *Tung nuts, milling.* Unloading nuts at the mill, cleaning, hulling (including field hulling), separating, drying, grinding, expelling, and filtering; moving the oil into storage tanks, the chemical extraction of oil from tung meal or filter press foots when performed at a tung mill as part of a continuous series of operations with the milling; and any operations performed at the tung mills which are necessary or incident to the foregoing.

(34) *Walnuts and filberts, unshelled, drying, packing, and storing.* The drying of walnuts and filberts, and the packing and storing of unshelled walnuts and filberts. This determination does not apply to the shelling of walnuts and filberts or to the packing or storing of walnut and filbert kernels.

(35) *Wild rice, processing.* The curing, drying, parching, hulling, and cleaning of wild rice; and the following operations when performed by employees of wild rice processors on or near the premises of wild rice processing plants during the wild rice processing season: The packaging and bagging of wild rice; the storing of wild rice and the removal of the wild rice from storage and placing it in transportation facilities; and any operations or services necessary or incident to the foregoing.

(36) *Wool, raw shorn fleece, receiving.* The receiving of raw shorn fleece

wool at primary concentration points and country receiving stations directly from the grower, and the assembling, grading, sacking, and preparing of such wool for shipment to market centers. The terms "primary concentration point" and "country receiving station" shall mean any establishment that receives all, or almost all, of its raw shorn fleece wool directly from the grower, and assembles, grades, sacks, and ships such wool to market centers for storage or sale.

(37) *Wool, raw shorn Texas, and/or mohair; receiving for storage in Texas.* The unloading, weighing, marking for identification, placing into storage and storing of Texas wool (as that term is used in the industry) and/or mohair and any operations or services necessary or incident to the foregoing, including incidental grading and selling, during the period or periods when wool or mohair is being received for storage.

[34 FR 18544, Nov. 24, 1969, as amended at 35 FR 18729, Dec. 10, 1970]

§ 526.11 Industries characterized by annually recurring seasonal peaks of operation.

(a) *General.* (1) The industries listed in paragraph (b) of this section have been found to be engaged in the operations on perishable agricultural commodities and to have the seasonal characteristics required for exemption under section 7(d)(1)(*a*) of the Fair Labor Standards Act of 1938, as amended, but have not been found to qualify for the exemption in section 7(c) of such Act. An employer operating an establishment in an enterprise in any such industry in which operations named in the finding are carried on may select the workweeks (not more than 14) in each calendar year in which the partial overtime exemption provided by section 7(d) will be applied to employees in such establishment. (See § 516.19 of this chapter.) During each of the workweeks thus selected, any employee may be employed by an employer in such establishment without payment of the overtime compensation prescribed by section 7(a) of the Act, if such employee is not employed in any nonexempt work outside the scope of the industry and is paid overtime compensation at a rate not less than one and one-half times the regular rate at which he is employed for all hours worked in such workweek in excess of 10 in any workday or in excess of 48 in the workweek, whichever is greater. No employer, however, is permitted to employ any employee under the special provisions of section 7(d) in any industry in the following list for more than 14 workweeks in any calendar year.

(b) *Industries found to be seasonal in nature, name and definition*—(1) *Cottonseed processing industry.* The receiving, handling, and storing of cottonseed; the processing of cottonseed during the period when the seed is being received, and any operations necessary and incident to the foregoing during this period.

(2) *Dairy products industry.* Includes all, but only, the following operations:

(i) Transportation of milk and cream from farms.

(ii) Handling and preparing milk or cream at receiving stations, fluid milk plants, and processing plants, and transporting the milk or cream from one to the other.

(c) First processing of milk, buttermilk, whey, skimmed milk or cream into dairy products, including: Pasteurized, flavored, condensed, evaporated, concentrated, or dried whole or skimmed milk; sweet, sour, or dried cream; whey, renovated, process or creamery butter; any variety of cheese including natural or processed; condensed, evaporated, or dried buttermilk; wet or dried casein; malted milk powder; crude milk sugar; ice cream, ice milk, and sherbet (except water ices).

(d) Any operations or services necessary or incident to the foregoing performed by employees employed by an employer in an enterprise which is in the industry, including necessary packaging, storage, and shipping at the plant of the dairy products made by the enterprise, plant maintenance, machinery repair, clerical work necessary or incident to the operations described in paragraphs (a) through (c) of this section, handling the nondairy ingredients used in the dairy products, aging, cleaning, paraffining, weighing, slicing, and wrapping cheese made by the enterprise, assembling knock-down boxes and transferring ingredients and supplies from stock to meet the daily needs of processing operations.

(e) Any other operations normally performed in the Dairy Products Industry which do not occupy more than 20 percent of the time worked in any workweek by an employee for whom the exemption is claimed, not included in the industry are operations which do not constitute or are not necessary or incident to the operations of an enterprise engaged in activities described in paragraphs (a) through (c) of this section, and which exceed the amount provided in this paragraph (e) of this section, such as storing, slicing, and packaging cheese and printing, wrapping, and storing butter bought in bulk from cheesemakers and buttermakers, further processing of dry casein, regrinding, rescreening, and repacking dried whey, handling and distributing nondairy products as a wholesaler or other distributor.

[34 FR 18547, Nov. 21, 1969]

§ 526.12 Seasonal industries engaged in certain operations on perishable agricultural or horticultural commodities.

(a) *General.* (1) The industries listed in paragraph (b) of this section have been found to be seasonal in nature and engaged in certain operations on perishable agricultural or horticultural commodities in their raw or natural state so that both the partial exemptions from the maximum hours requirement of the Fair Labor Standards Act of 1938 provided in its sections 7(c) and 7(d) apply to them. An employer operating an establishment in an enterprise in any such industry in which operations named in the finding are carried on may select the workweeks (not more than 10 for each exemption, or a total of 20 for both exemptions) in each calendar year in which the partial overtime exemptions provided by sections 7(c) and 7(d) will be applied in such establishment. (See §§ 516.18 and 516.19 of this chapter.) During each of the 20 workweeks thus selected, any employee may be employed by an employer in such establishment without payment of the overtime compensation prescribed by section 7(a) of the Act, if such employee is not employed in any nonexempt work outside the scope of the industry and is paid overtime compensation at a rate not less than one and one-half times the regular rate at which he is employed for all hours worked in such workweek in excess of 10 in any workday or in excess of 50 in not more than 10 of the workweeks which may be attributed to section 7(c), or in excess of 10 hours in any workday or in excess of 48 hours in the workweek in not more than 10 of the workweeks which may be attributed to section 7(d), whichever number of hours attributed to daily or weekly overtime work is greater. No employer, however, is permitted to employ any employee under the special provisions of sections 7(c) and 7(d) combined in any industry in the following list for more than 20 workweeks in any calendar year.

(b) *Industries found to be seasonal in nature, name and definition*—(1) *Field grown cut and potted flower industry.* The original assembly of field grown cut and potted flowers from the growers, including the sorting, grading, handling, packing, and shipping, and transporting to carriers or to market, and any other operations necessary or incidental thereto.

(2) *Fresh fruit and vegetable industry.* Includes only the handling, packing, storing, preparing, first processing, and canning, of any fresh fruits and vegetables in their raw or natural state and any other operations and services necessary and incidental thereto. It includes such operations when performed in connection with fresh fruits and vegetables which have been merely refrigerated, but does not include operations performed in connection with fresh fruits and vegetables which have been frozen, preserved, canned, dehydrated, or otherwise changed so that they are no longer perishable or in their raw or natural state. The industry to which these findings apply may include transactions whereby, for purpose of filling a customer's order, fresh fruits and vegetables that have been packed or canned by employees of one employer are commingled with those packed or canned by the employees of the employer claiming these exemp-

tions: *Provided*, That the amount of fill-in goods is 5 percent or less of the weekly volume of shipments made during each week in which the exemption is claimed.

(3) *Hop drying industry.* The receiving, picking, and drying of hops and any operations necessary or incidental to the foregoing including the curing, compressing, and baling of hops when performed at the hop drying establishment during the hop drying period.

(4) *Mint oil distilling industry.* The distilling of mint oil from mint hay, including any operations necessary or incidental thereto.

(5) *Nursery stock storing and packing industry.* The handling, packing, storing, and preparing of nursery stock, and any operations necessary or incidental thereto.

(6) *Sugarcane processing and milling industries*—(i) *Sugarcane processing and milling industry in Florida.* The activities comprising the industry are the following:

(*a*) The loading of sugarcane in the fields and its transportation to a sugarcane processing mill when performed by employees of the processor; the unloading of sugarcane at the mill; and the processing of sugarcane into raw sugar, syrup, and molasses;

(*b*) The following operations when performed on the premises of a sugarcane mill while the sugarcane is being processed: The immediate refining, as one of a connected series of operations, of raw sugar produced from sugarcane ground on the premises; the refining, by the introduction into such series of operations, of raw sugar which has been produced during the same grinding season in other Florida cane processing plants of the employer, except in establishments where the refined sugar made from such transferred raw sugar constitutes one-half or more of the refined sugar produced during the cane processing season, or where purchased raw sugar, or raw sugar produced outside of Florida is refined during the cane processing season; the burning, removing from the premises or dehydrating of bagasse resulting from the processing of sugarcane;

(*c*) The handling, baling, bagging, packing, and storing of the sugar, syrup, molasses, or bagasse;

(*d*) The repair of mechanical equipment used in loading and transporting sugarcane to the mill;

(*e*) Any operations necessary and incidental to those described in paragraphs (b)(6)(i) (*a*), (*b*), (*c*), and (*d*) of this section, including the placing of these products in storage or transportation facilities on or near the premises; and

(*f*) Clerical, custodial, or other common activities in the harvesting and processing of sugarcane in Florida performed by employees of a processing establishment during the processing season as an incident to or in conjunction with the harvesting of the cane processed at such establishment in accordance with the customary practice of the enterprises of the sugarcane processing and milling industry in Florida.

(ii) *Sugarcane processing and milling industry in Puerto Rico.* In the Commonwealth of Puerto Rico, the transportation of sugarcane to a sugarcane processing mill when performed by employees of the processor; the unloading of sugarcane at the mill; the processing of sugarcane into raw sugar, syrup, and molasses; and the following operations when performed on the premises of a sugarcane mill while the sugarcane is being processed; the immediate refining, as one of a connected series of operations, of raw sugar produced from sugarcane ground on the premises; the refining, by the introduction into such series of operations, of raw sugar which has been produced during the same grinding season in other Puerto Rican can processing plants of the employer, except in establishments where the refined sugar made from such transferred raw sugar constitutes one-half or more of the refined sugar produced during the cane processing season, or where purchased raw sugar or raw sugar produced outside of Puerto Rico is refined during the cane season; the burning, removing from the premises, or dehydrating of bagasse resulting from the processing of sugarcane; the handling, baling, bagging, packing, and storing of the sugar, syrup, molasses, or bagasse; and any operations necessary and incident to the foregoing, including the placing of these products in storage or transportation facilities on or near the premises.

[34 FR 18548, Nov. 21, 1969, as amended at 35 FR 7727, May 20, 1970]

PART 527—EMPLOYMENT OF STUDENT WORKERS

Sec.
527.1 Applicability of the regulations contained in this part.
527.2 Definitions.
527.3 Application for a student-worker certificate.
527.4 Procedure for action upon an application.
527.5 Conditions governing issuance of a student-worker certificate.
527.6 Terms and conditions of employment under student-worker certificates.
527.7 Employment records to be kept.
527.8 Amendment or replacement of a student-worker certificate.
527.9 Amendment to the regulations in this part.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214.

SOURCE: 20 FR 7737, Oct. 14, 1955, unless otherwise noted.

§ 527.1 Applicability of the regulations contained in this part.

The regulations contained in this part are issued under section 14 of the Fair Labor Standards Act of 1938, as amended, to provide for the employment under special certificates of student-workers at wages lower than the minimum wage applicable under section 6 of the act. Such certificates shall be subject to the terms and conditions hereinafter set forth.

§ 527.2 Definitions.

As used in the regulations contained in this part: A "student-worker" is a student who is receiving instruction in an educational institution and who is employed on a part-time basis in shops owned by the educational institution, for the purpose of enabling the student to defray part of his school expenses.

§ 527.3 Application for a student-worker certificate.

(a) Whenever the employment of student-workers as learners at wages lower than the minimum wage applicable under section 6 of the Fair Labor Standards Act of 1938, as amended, is believed necessary to prevent curtailment of opportunities for employment in a specified educational institution, an application for a special certificate authorizing the employment of such student-workers as learners at subminimum wage rates may be filed by an appropriate official of the educational institution with the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210. A copy of such application shall be filed simultaneously with the appropriate Regional Office of the Division.

(b) Application must be made on the official form furnished by the Division and must contain all information required by such form, including among other things, the industries and occupations within each industry in which the student-workers are to be employed as learners, the number of student-workers requested, their proposed hourly rates and learning periods in number of hours, the number of full-time experienced workers in such occupations and their straight-time average hourly earnings during the past year, and a description of the products being manufactured in the school-operated industry. Any applicant may also submit such additional information as may be pertinent.

(c) Any application which fails to present the information required by the forms may be returned to the applicant with a notation of deficiencies and without prejudice against submission of a new or revised application.

§ 527.4 Procedure for action upon an application.

(a) Upon receipt of an application for the employment of student workers as learners, the Administrator or his authorized representative shall issue or deny a special certificate. To the extent he deems appropriate, the Administrator or his authorized representative may provide an opportunity

BEST DOCUMENT AVAILABLE

to other interested persons to present data and views on the application prior to granting or denying a student-worker certificate.

(b) If a student-worker certificate is issued, it shall be mailed to the educational institution. If a student-worker certificate is denied, notice of such denial shall be sent to the educational institution and such denial shall be without prejudice to the filing of any subsequent application.

(c) If a student-worker certificate is issued, there shall be published in the FEDERAL REGISTER a statement of the terms of such certificate.

[20 FR 7737, Oct. 14, 1955, as amended at 24 FR 204, Jan. 8, 1959]

§ 527.5 Conditions governing issuance of a student-worker certificate.

The following conditions shall govern the issuance of a special certificate authorizing the employment of student-workers as learners at subminimum wage rates:

(a) The employment of the student-workers at subminimum wages authorized by the special certificate must be necessary to prevent curtailment of opportunities for employment in a specified educational institution;

(b) The student-workers must be at least 16 years of age or at least 18 years of age if employed in any occupation declared to be particularly hazardous by order of the Secretary of Labor pursuant to the Fair Labor Standards Act of 1938, as amended;

(c) The occupation for which the student-workers are receiving training must require a sufficient degree of skill to necessitate an appreciable learning period;

(d) The issuance of a student-worker certificate will not tend to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage or working standards established for experienced workers for work of a like or comparable character in the industry;

(e) There have been no serious outstanding violations of the provisions of a student-worker certificate previously issued to the educational institution, nor have there been any serious violations of the act which provide reasonable grounds to conclude that the terms of a student-worker certificate may not be complied with, if issued.

§ 527.6 Terms and conditions of employment under student-worker certificates.

(a) The student-worker certificate, if issued, shall specify, among other things: (1) The name and address of the educational institution employing the student-workers; (2) the particular industry and the occupations in which the student-workers are to be trained; (3) the number of student-workers authorized to be employed on any one day; (4) the subminimum wage rates permitted during the authorized learning period; (5) the learning period for each authorized learner occupation or group of occupations within each industry; and (6) the effective and expiration dates of the certificate.

(b) The subminimum wage rate shall be not less than 75 percent of the wage rate applicable under section 6 of the Fair Labor Standards Act of 1938, as amended, or the progressive wage schedule shall average not less than 75 percent of such applicable minimum over the authorized learning period.

(c) No student-worker certificate may be issued retroactively.

(d) A student-worker certificate may be issued for a period not to exceed the one school year, unless a longer period is found to be justified by extraordinary circumstances.

(e) No provision of a student-worker certificate shall excuse noncompliance higher standards applicable to student-workers employed as learners which may be established under any other Federal law, or any State law, or municipal ordinance.

§ 527.7 Employment records to be kept.

In addition to any other records required under the record keeping regulations (Part 516 of this chapter), the educational institution shall keep the following records specifically relating to student-workers employed as learners at subminimum wage rates.

(a) Each student-worker employed as a learner under a student-worker certificate shall be designated as such on the payroll records kept by the school, with each student-worker's occupation and rate of pay being shown.

(b) The records required in this section, including a copy of any special certificate issued, shall be kept and made available for inspection at all times for at least three years from the last effective date of the certificate.

§ 527.8 Amendment or replacement of a student-worker certificate.

The Administrator upon his own motion may amend the provisions of a student-worker certificate when it is necessary by reason of the amendment of the regulations in this part, or may withdraw a student-worker certificate and issue a replacement certificate when necessary to correct omissions or apparent defects in the original certificate.

§ 527.9 Amendment to the regulations in this part.

The Administrator may at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of the regulations contained in this part.

PART 528—ANNULMENT OR WITHDRAWAL OF CERTIFICATES FOR THE EMPLOYMENT OF STUDENT LEARNERS, APPRENTICES, LEARNERS, MESSENGERS, HANDICAPPED PERSONS, STUDENT-WORKERS, AND FULL-TIME STUDENTS IN AGRICULTURE OR IN RETAIL OR SERVICE ESTABLISHMENTS AT SPECIAL MINIMUM WAGE RATES

Sec.

528.1 Applicability of the regulations in this part.
528.2 Definition of terms.
528.3 Withdrawal and annulment of certificates.
528.4 According opportunity to demonstrate or achieve compliance.
528.5 Proceedings for withdrawal or annulment.
528.6 Review.
528.7 Effect of order of annulment or withdrawal.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended; 29 U.S.C. 214, unless otherwise noted.

§ 528.1 Applicability of the regulations in this part.

The regulations in this part shall govern the annulment or withdrawal of any certificate except a temporary certificate issued pending final action on an application, issued pursuant to Parts 519, 520, 521, 522, 523, 524, and 527 of this chapter, and having effect under section 14 of the Fair Labor Standards Act of 1938.

[27 FR 3994, Apr. 26, 1962]

§ 528.2 Definition of terms.

As used in the regulations contained in this part, the term:

(a) "Withdrawal" shall mean termination of validity of a certificate with prospective effect from the time of the action of withdrawal.

(b) "Annulment" shall mean withdrawal of a certificate with retroactive effect to the date of issuance.

(c) "Authorized representative" shall mean: (1) The Assistant Regional Administrators for the Wage and Hour Division (who are authorized to redelegate this authority) within their respective regions, and (2) the Caribbean Director of the Wage and Hour Division for the area covered by the Caribbean office.

(d) "Area director" shall include any area director of the Wage and Hour Division.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913). Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

§ 528.3 Withdrawal and annulment of certificates.

(a) An authorized representative may withdraw a certificate from any employer within that representative's region who, acting under color of any certificate or application for the employment of learners, handicapped workers, student workers, student learners, apprentices, messengers, or full-time students in agriculture, retail, or service establishments, or in institutions of higher education at subminimum wages under section 14 of the act, fails to comply with the limitations in such certificate or otherwise violates the act.

(b) An authorized representative may annul a certificate affected by mistake in its issuance if the employer knowingly induced or knowingly took advantage of the mistake. Where the employer did not knowingly induce the mistake but knowingly took advantage of it, a new certificate shall be issued by the authorized representative if, and on such terms as, such certificate would have been issued had there been no mistake limited in its term from the date of issuance to the date of annulment of the annulled certificate.

(c) A certificate may be withdrawn in the public interest by a representative authorized to issue such type of certificate whenever any part of the exemption it provides is no longer necessary to prevent curtailment of opportunities for employment. If appropriate, a more limited replacement certificate may be issued by the authorized representative.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

§ 528.4 According opportunity to demonstrate or achieve compliance.

Prior to instituting proceedings for withdrawal of a certificate under paragraph (a) of § 528.3, except in cases of willfullness, an area director shall mail a letter to the employer setting forth alleged facts or conduct which may warrant withdrawal of the certificate, and fixing a time and a place for a conference at which the employer shall be accorded an opportunity to show that no cause for withdrawal under § 528.3(a) exists or that compliance has been achieved by paying wages improperly withheld and by taking steps adequate to insure that new cause for annulment or withdrawal will not occur. By written report to the appropriate authorized representative, a copy of which shall be mailed to the employer, the area director shall concisely summarize the conference and shall include conclusions as to whether the employer demonstrated or achieved compliance. If the authorized representative is satisfied that the employer either demonstrated or achieved such compliance, no proceedings shall be instituted under § 528.3(a) for the withdrawal of the certificate.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913), Employment Standards Order 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

§ 528.5 Proceedings for withdrawal or annulment.

The representative authorized to withdraw or annul a certificate under § 528.3 shall institute proceedings by a letter mailed to the employer and, where appropriate, to the apprenticeship agency (in the case of apprentice certificates) or the responsible school official (in the case of student-learner certificates), setting forth alleged facts which may warrant such annulment or withdrawal and advising the employer that such an annulment or withdrawal of the scope provided in § 528.7 will take effect at a time specified unless facts are presented which convince the authorized representative that such action should not be taken. The letter shall advise such person, agency, or official of the right to respond by mail or to appear by or with counsel or by other duly qualified representative at a specified time and place. If there is no timely objection to the withdrawal or annulment thus proposed, it shall be deemed effective according to the terms of the letter instituting the annulment or withdrawal proceeding without the necessity of any further action. If objection to the annulment or withdrawal as proposed is made within the specified time the further proceedings shall be as informal as practicable commensurate with orderly dispatch and fairness. Department of Labor investigation files or reports or portions thereof may be considered in such proceedings to the extent they are made available for examination during the proceedings. If objection to the proposed annulment or withdrawal is made by such specified time, the authorized representative shall, after considering all pertinent matters presented, mail a letter to the employer and, where appropriate, to the apprenticeship agency or the responsible school official, setting out that representative's findings of specific pertinent facts and conclusions and that representative's order concerning the proposed annulment or withdrawal. In proceedings instituted for annulment, the order may provide for withdrawal instead of annulment if the proof warrants such withdrawal but fails to support adequately the annulment. Such an order shall be deemed issued and effective according to its terms when mailed.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

§ 528.6 Review.

Any employer and, when appropriate, any apprenticeship agency or responsible school official, who expressed timely objection to the proposed action prior to issuance of an order of annulment or withdrawal may obtain review, limited to the question of whether the findings of fact support the order under the regulations in this part. Application for such review shall be in writing addressed to the Administrator and mailed within 15 days after the order is issued. The Administrator may affirm, modify, or reverse the order, or may remand it for further proceedings. The order under review shall not be stayed in effect pending such review. Any aggrieved person may obtain such review of an order entered in proceedings instituted under paragraph (c) of § 528.3.

[21 FR 5316, July 17, 1956, as amended at 22 FR 5683, July 18, 1957]

§ 528.7 Effect of order of annulment or withdrawal.

Except as otherwise expressly provided in such order, any order of annulment or withdrawal under paragraph (a) or (b) of § 528.3 shall be effective to terminate all certifications to which the regulations in this part apply in effect at the establishment where the cause for withdrawal arose or where the annulled certificate had effect. After such annulment or withdrawal, such employer shall be ineligible to obtain or exercise the privileges granted in such a certificate until he satisfies the issuing officer that he will not again give cause for annulment or withdrawal if a certificate is issued.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28469, June 30, 1978]

PART 529—EMPLOYMENT OF PATIENT WORKERS IN HOSPITALS AND INSTITUTIONS AT SUBMINIMUM WAGES

Sec.
529.1 Statutory language and scope of regulations.
529.2 Definitions.
529.3 Advisory Committee on Sheltered Workshops.
529.4 Wage payments.
529.5 Application for certificates.
529.6 Criteria for consideration in issuance of certificates.
529.7 Issuance of certificates.
529.8 Terms and conditions of certificates.
529.9 Renewal of certificates.
529.10 Records to be kept.
529.11 Cancellation of a certificate.
529.12 Review.
529.13 Submission of information, investigations, and hearings.
529.14 Relation to other laws.
529.15 Issuance of certificates for experimental purposes.
529.16 Amendment of this part.
529.17 Review of regulations.

AUTHORITY: Sec. 14, 52 Stat. 1068, as amended (29 U.S.C. 214).

SOURCE: 40 FR 5776, Feb. 7, 1975, unless otherwise noted.

§ 529.1 Statutory language and scope of regulations.

(a) The Fair Labor Standards Act as amended, among other things, makes provision for the employment of handicapped persons at subminimum wages under certificate. This provision is now designated as section 14(c) of the Act. It reads as follows:

> (c) (1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of op-

portunities for employment, shall by regulation or order provide for the employment under special certificates of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age or physical or mental deficiency or injury at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.

(2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—

(A) handicapped workers engaged in work which is incidental to training or evaluation programs, and

(B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment, at wages which are less than those required by this subsection and which are related to the worker's productivity.

(3) (A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimum applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.

(B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

(b) Authority to promulgate the regulations and issue the certificates referred to in section 14(c) has been delegated by the Secretary to the Administrator of the Wage and Hour Division (Secretary's Orders 13-71 and 15-71 (36 FR 8755 and 8756)).

(c) Patient workers whose earning or productive capacity is not impaired shall be paid at least the statutory minimum wage. For patient workers whose earning or productive capacity is impaired to the extent that they are not able to earn the statutory minimum wage, the regulations in this Part 529 govern certificates authorizing special minimum wages for patient workers in hospitals and institutions for the sick, the aged, and the mentally ill or defective with the following exceptions which are governed by Parts 524 and 525 of this chapter, as appropriate:

(1) Patients of hospitals or institutions working for employers other than hospital or institution.

(2) Patients working in sheltered workshops, including work activities centers, as defined in Part 525, operated by the hospital or institution.

§ 529.2 Definitions.

(a) "Administrator" means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(b) "Patient worker" or "resident worker," hereafter referred to as "patient worker," means a sick, aged or mentally ill or defective individual who receives treatment or care by a hospital or institution, whether he or she is a resident or not, and has an employment relationship with such establishment, other than in a sheltered workshop program.

(c) "Hospital or institution," hereinafter referred to an "institution," is a public or private, nonprofit or profit facility primarily engaged in (i.e., more than 50 percent of the income is attributable to) providing residential care for the sick, the aged, or the mentally ill or defective, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and infirm, halfway houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed.

(d) "Employment relationship" generally arises whenever a patient is suffered or permitted to work. The total facts surrounding a given situation, other than those factors specifically excluded in this subsection, determine whether the test is satisfied. A major factor in determining whether or not an employment relationship exists under this Part is whether the work performed is of any consequential economic benefit to the institution. Generally, work shall be considered to be of consequential economic benefit if it is of the type that nonhandicapped workers normally perform, in whole or in part, in the institution or elsewhere. A patient does not, however, become an employee merely if he or she performs personal housekeeping chores, such as maintaining his or her own quarters, or receives a token remuneration for his or her services. Nor does the patient become an employee if engaged in such activities as making craft products, where the patient voluntarily engages in such activity and the products become the property of the patient making them, or the funds resulting from the sale of the products are divided among the patients participating in that program or are used for purposes of purchasing materials consumed in making the craft products. On the other hand, determination of an employment relationship does not depend on the level of performance of the patient or whether the work is of therapeutic value to the patient.

(e) "Evaluation and training" means a program, authorized pursuant to section 14(c)(2)(A) of the Act, which provides competent instruction and supervision and is designed to determine a working patient's potential and to teach adjustment to a work environment or the skills related to one or more types of work. The duration of the evaluation and training depends on the total facts of the situation, but in no case shall exceed 12 months. Time spent in an employment relationship in the institution prior to the effective date of these regulations shall be counted in determining the duration a patient worker is in evaluation and training. (Any workweek during which there was regular and recurrent engagement in work, even though small in amount, which gave rise to an employment relationship, shall be considered as a week spent in evaluation and training.)

(f) "Group minimum wage" means the minimum wage authorized pursuant to section 14(c)(1) of the Act which shall apply to all patient workers who have completed the evaluation and training program, if one has been authorized for the institution under this part (where no such program has been authorized, the group minimum wage applies immediately upon a patient's entering into an employment relationship with the institution), except for patient workers who are: Entitled to a commensurate wage higher than the group minimum wage; subject to an individual exception; or subject to a work activities center certificate, as defined in this part.

(g) "Individual exception" means authorization, pursuant to section 14(c)(2)(B) of the Act, to pay a particular patient worker whose earning or productive capacity is severely impaired less than the group minimum wage.

(h) "Work activities center" is an administrative classification given to a facility which has an approved program (other than a work activities center program as defined in Part 525), authorized pursuant to section 14(c)(3) of the Act, which is planned and designed exclusively to provide work activities for patients whose physical or mental impairment is so severe as to render their productive capacity inconsequential. The work activities shall be part of a recorded plan of therapy or care for such patients. Such activities need not, however, be restricted to a particular physical or program area of the institution, nor to a particular type of work. No program shall qualify for a work activities center certificate under this part unless the productive capacity of each individual in the program is so severely impaired as to make that person incapable of earning as commensurate pay at least 25 percent of the minimum wage under section 6 of the Act, and the patient workers are participating in the program as a part of planned therapy.

(i) "Commensurate pay" (the term used in these regulations) is intended to have the same meaning as "equitable compensation" and "wages related to the worker's productivity," which terms are used in the statute, and means wages which are commensurate with those paid nonhandicapped workers in the institution or in industry maintaining acceptable labor standards in the vicinity for essentially the same type, quality, and quantity of work. So for example, the commensurate pay of a patient worker who is 75 percent as productive, considering quality and quantity, as the average nonhandicapped worker performing essentially similar work in the institution would be at least 75 percent of the wage paid to such nonhandicapped worker.

(j) "State agency" means the agency within the State which administers or supervises the administration of vocational rehabilitation services in any State of the United States, the District of Columbia, or any territory or possession of the United States.

(k) "The Act" means the Fair Labor Standards Act of 1938, as amended.

§ 529.3 Advisory Committee on Sheltered Workshops.

(a) The Advisory Committee on Sheltered Workshops, appointed periodically by the Secretary of Labor, shall advise and make recommendations to the Administrator concerning the administration and enforcement of this part and the need for amendments thereto and for such other purposes as may be desired by the Administrator.

(b) The Administrator may consult with the Advisory Committee on Sheltered Workshops prior to any action taken under this part and may afford the Committee 15 days, or such additional time as may be allowed, to present its views. The Administrator may also afford the Committee an opportunity to present its views in connection with any petition for review filed, any hearing held, and any petition for amendment of these regulations, or any proposed legislation by the Secretary of Labor pertaining to the problems dealt with in these regulations.

§ 529.4 Wage payments.

(a) A patient worker whose earning or productive capacity is not impaired shall be paid at least the statutory minimum wage. A patient worker whose earning or productive capacity is impaired to the extent that the individual is unable to earn at least the statutory minimum wage may be paid a subminimum wage but only after a certificate authorizing payment of such lower wage has been obtained from the Wage and Hour Division.

(b) Four types of certificates authorizing subminimum wages are available for patient workers in institutions: Evaluation and training, group minimum wage, individual exception, and work activities center. All but the individual exception are group certificates. Under a group certificate, the program is certificated and not the individual patient worker. In the case of the individual exception, authority to pay a subminimum wage must be obtained for each individual.

(c) Evaluation and training: Patient workers subject to an evaluation and training certificate shall receive at least commensurate pay; no minimum wage guarantee is required unless the Administrator, shall determine it is in the best interest of the patient workers that a minimum wage guarantee be set.

(d) Group minimum wage: Patient workers subject to a group minimum wage certificate shall receive at least the minimum wage authorized in the certificate or commensurate pay, whichever is higher. The group minimum wage shall not be less, and may be more, than 50 percent of the minimum wage under section 6 of the Act.

(e) Individual exception: A patient worker subject to an individual exception shall receive not less than the minimum wage authorized in the individual exception certificate issued for that patient worker or commensurate pay, whichever is higher. An individual exception shall not be less, and may be more, than 25 percent of the minimum wage under section 6 of the Act.

(f) Work activities center: Patient workers subject to a work activities center certificate shall receive at least commensurate pay; no minimum wage guarantee is required unless the Administrator, shall determine it is in the best interest of the patient workers that a minimum wage guarantee be set.

(g) Compensable time for a patient worker starts when the individual begins to perform work involving an employment relationship.

(h) Each patient worker's work performance shall be reviewed by the institution at three month intervals during the first 6 months in an employment relationship, and at least every 6 months thereafter and his or her wages adjusted accordingly. The review shall relate the patient worker's quantity and quality of performance to that of nonhandicapped workers receiving the prevailing wage in the institution for similar work or work requiring similar skills. If similar work or work requiring similar skills is not performed by nonhandicapped workers in the institution the prevailing wage paid nonhandicapped workers in the vicinity in industry maintaining acceptable labor standards shall be used. The review shall be made by a staff member or members who observe the patient worker(s) being rated on a continuing basis and who are familiar with appropriate nonhandicapped production standards.

(i) No part of the minimum wage and overtime earned by a patient worker can be deducted for the cost of room, board or services. The patient worker must receive his or her wages free and clear, except for legal payroll deductions. It is not the intention of these regulations, however, to preclude the institution thereafter from assessing or collecting the reasonable cost of room, board and other services actually provided to a patient worker to the extent permitted by applicable Federal or State law and on the same basis as it assesses and collects from nonworking patients.

§ 529.5 Application for certificates.

(a) Application for a certificate for an evaluation and training program, a group minimum wage, an individual exception, or a work activities center may be filed by any institution with the Regional Office or Caribbean Director of the administrative region or area of the Wage and Hour Division, U.S. Department of Labor, in which the institution is located. Application forms may be obtained from the appropriate Office.

(b) An application for an evaluation and training certificate and for an individual exception certificate for payment of a wage below 50 percent of the minimum wage under section 6 of the Act shall also be filed with the State agency. Before the Wage and Hour Division can act on such an application, the State agency must certify that the evaluation and training program meets the standards defined in § 529.2 or, in the case of an individual exception, that the individual's earning capacity is so severely impaired that he or she is unable to earn at least 50 percent of the minimum wage under section 6 of the Act.

(c) An institution initially applying for a certificate, other than an individual exception certificate, which does not have the information called for in the application, may be issued a temporary certificate if it meets the requirements of, and provides assurance of compliance with, this Part.

(d) Application for an individual exception certificate may be filed at the time of applying for a group minimum wage certificate or during the life of the certificate. The application must show, among other things, that the patient worker is unable to earn the minimum wage authorized in the group minimum wage certificate.

(e) An application for an individual exception filed before the patient worker has completed evaluation and training shall be considered timely. In such case, if action on the application is not completed before the expiration of the evaluation and training period, the minimum wage requested in the application by the institution (not less than 25 percent of the minimum wage) shall be the interim minimum wage.

§ 529.6 Criteria for consideration in issuance of certificates.

The following criteria will be considered by the Administrator in determining the necessity of issuing a certificate or certificates and the conditions to be specified therein:

(a) The present and previous earnings of the patient workers.

(b) Whether the patient workers are receiving commensurate pay.

(c) The nature and extent of the disabilities of the patient workers and the degree to which these factors affect earning or productive capacity of the patient workers.

(d) Whether the conditions required for certification under this part have been met.

(e) Whether the certification by the State agency has been made in accordance with this part.

§ 529.7 Issuance of certificates.

(a) Upon consideration of criteria specified in § 529.6, the Administrator may issue a certificate or certificates, as appropriate.

(b) If a certificate is issued, a copy shall be sent to the institution. If denied, the institution shall be notified in writing of the denial and the reasons therefor.

(c) A group minimum wage certificate may be issued for the entire institution or a department or departments of the institution.

§ 529.8 Terms and conditions of certificates.

(a) A certificate shall specify the terms and conditions under which it is granted.

(b) A certificate shall apply to every patient worker in the program for which the certificate is granted.

(c) A certificate shall be effective for a period to be designated by the Administrator, generally for a period of 1 year. Patient workers may be paid wages lower than the statutory minimum only during the effective period of a certificate.

(d) A group minimum wage certificate shall set a special minimum wage of not less than 50 percent of the minimum wage under section 6 of the Act. An individual exception certificate shall set a special minimum wage not less than 25 percent of the minimum wage under section 6 of the Act.

(e) An evaluation and training certificate and a work activities center certificate need not set a special minimum wage other than that required by paragraph (f) of this section or provided for by § 529.4.

(f) All patient workers subject to a certificate shall be paid wages commensurate with those paid nonhandicapped workers in the institution in which they are patients or in the vicinity in industry maintaining acceptable labor standards for essentially the same type, quality, and quantity of work, but not less than the certificate rate applicable if such a rate has been authorized.

(g) Patient workers shall be paid not less than one and one-half times the regular rate for all hours worked in excess of the maximum workweek applicable under section 7 of the Act.

(h) No patient worker shall be newly-employed under a certificate issued under these regulations while abnormal labor conditions, such as a strike, a lock-out, or other similar condition, exist in the institution.

(i) Each patient worker and his or her parent or guardian shall be informed promptly orally and in writing, of his or her rights under the Act.

(j) The terms of any certificate may be amended for cause, upon request of the institution, or a patient worker or his or her parent or guardian, or upon the initiative of the Administrator.

§ 529.9 Renewal of certificates.

(a) Application may be filed for renewal of any certificate.

(b) If an application for renewal has been properly and timely filed prior to the expiration date of a certificate, the certificate shall remain in effect until the application for renewal has been granted or denied.

(c) Patient workers may be paid wages less than the statutory minimum after notice that the application for renewal has been denied, if review of such denial is requested in accordance with § 529.12: *Provided, however,* That if the denial is affirmed on review, the institution shall reimburse any person covered by the certificate in an amount equal to the difference between the applicable minimum wage and any lower wage paid such person subsequent to the effective date of denial.

§ 529.10 Records to be kept.

Every institution shall maintain and have available for inspection by the Administrator records of:

(a) Disability, which show the nature of each patient worker's disability.

(b) Productivity, which show the productivity of each patient worker on a continuing basis or at periodic intervals as defined in § 529.4(h).

(c) Prevailing wage, which show the prevailing wages paid nonhandicapped workers in the institution or in industry in the vicinity for essentially similar work to that performed by the patient workers.

(d) Production standards for an average nonhandicapped worker for each job being performed by a patient worker in the institution (for use as a norm in measuring patient worker productivity.)

(e) When an evaluation and training program is authorized by certificate, records showing which patient workers are in the evaluation and training program, and the total period of time each worker has been in such a category.

(f) When an institution holds both a work activities center certificate and a group minimum wage certificate, records showing which patient workers are under each certificate.

(g) Records showing the patient workers for whom individual exceptions have been authorized.

(h) In addition, the records required under all the applicable provisions of Part 516 of this chapter.

(i) Every institution having patient workers who are entitled to benefits under the Act shall at all times display a poster, as prescribed by the Administrator, in a conspicuous place in the institution where it may be observed readily by the patient workers and other workers in the institution.

(j) Records required by this section shall be kept for the periods specified in Part 516 of this chapter.

§ 529.11 Cancellation of a certificate.

(a) The Administrator may cancel any certificate for cause. A certificate may be canceled (1) as of the date of issuance, if it is found that fraud has been utilized in obtaining the certificate or in permitting a patient worker to be employed thereunder; (2) as of the date of violation, if it is found that any of the provisions of the Act or of the terms of the certificate have been violated; or (3) as of the date of notice of cancellation, if it is found that the certificate is no longer necessary in order to prevent curtailment of opportunities for employment, or that the requirements of this part have not been complied with.

(b) If a petition for review is filed under § 529.12, the effective date of the cancellation shall be postponed until action is taken thereon: *Provided, however,* That if the concellation order is affirmed on review, the institution shall reimburse any person covered by the certificate in an amount equal to the difference between the applicable minimum wage and any lower wage paid such person subsequent to the effective date of cancellation.

(c) Except in cases of willfulness or those in which the public interest requires otherwise, before any certificate shall be canceled, facts or conduct which may warrant such action shall be called to the attention of the institution in writing and it shall be afforded an opportunity to demonstrate or achieve compliance with all lawful requirements.

§ 529.12 Review.

Any person aggrieved by any action of an authorized representative of the Administrator taken pursuant to this part may, within 60 days or such additional time as the Administrator may allow, file with the Administrator a petition for review. Such review, if granted shall be made either by the Administrator or by an authorized representative who took no part in the action under review, who may, to the extent it is deemed appropriate, afford other interested persons an opportunity to present data and views.

§ 529.13 Submission of information, investigations, and hearings.

The Administrator may require at any time the submission of such information, other than that specified elsewhere in this part, as is deemed appropriate, or may conduct an investigation, which may include a hearing, prior to taking any action pursuant to this part. To the extent it is deemed appropriate, the Administrator may provide an opportunity to other interested persons to present data and views.

§ 529.14 Relation to other laws.

No provision of this part, or of any certificate issued under this part, shall excuse noncompliance with any other Federal or State law or municipal ordinance establishing higher standards.

§ 529.15 Issuance of certificates for experimental purposes.

In addition to the issuance of certificates as provided in §§ 529.1 to 529.14, the Administrator may authorize the issuance of certificates to permit employment of patient workers in institutions at less than the applicable minimum wage under section 6 of the Act as part of experimental programs to increase employment opportunities for such persons Such certificates shall be issued in such types of cases and on such terms and conditions within the scope of section 14 of the Act as the Administrator shall determine will best further any such experimental programs. Certificates issued under this section shall be limited to an effective period of not more than 1 year.

§ 529.16 Amendment of this part.

The Administrator may at any time upon his or her own motion or upon written request of any interested person setting forth reasonable ground therefor, and after opportunity has been given to interested persons to present their views, amend or revoke any of the terms of this part.

§ 529.17 Review of regulations.

Approximately six months after the effective date of this part, the Wage and Hour Division will undertake a review of its program for administration and enforcement of this Part in cooperation with the Advisory Committee on Sheltered Workshops.

PART 530—EMPLOYMENT OF HOMEWORKERS IN CERTAIN INDUSTRIES

Sec.
530.1 Definitions.
530.2 Restriction of homework.
530.3 Application on official forms.
530.4 Terms and conditions for the issuance of certificates.
530.5 Investigation.
530.6 Termination of certificates.
530.7 Revocation and cancellation.
530.8 Preservation of certificates.
530.9 Records and reports.
530.10 Delegation of authority to grant, deny, or cancel a certificate.
530.11 Petition for review.
530.12 Special provisions.
530.13 Petition for amendment of regulations.

AUTHORITY: Sec. 11, 52 Stat. 1066; 29 U.S.C. 211, unless otherwise noted.

SOURCE: 24 FR 729, Feb. 3, 1959, unless otherwise noted.

§ 530.1 Definitions.

(a) The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production," as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homeworker" and "homeworker," as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(d) The women's apparel industry is defined as follows: The production of women's, misses' and juniors' dresses, washable service garments, blouses, and neckwear from woven or purchased knit fabric; women's, misses', children's and infants' underwear, nightwear, and negligees from woven fabrics; corsets and other body supporting garments from any material; other garments similar to the foregoing; and infants; and children's outerwear.

(e) The jewelry manufacturing industry is defined as follows:

(1) (i) The manufacturing, processing, or assembling, wholly or partially from any material, of jewelry, commonly or commercially so known. Jewelry as used herein includes without limitation, religious, school, college, and fraternal insignia; articles of ornament or adornment designed to be worn on apparel or carried on or about the person, including, without limita-

BEST DOCUMENT AVAILABLE

tion, cigar and cigarette cases, holders, and lighters; watch cases; metal mesh bags and metal watch bracelets; and chain, mesh, and parts for use in the manufacture of any of the articles included in this definition. Jewelry as used in this part does not include pocket knives, cigar cutters, badges, emblems, military and naval insignia, belt buckles, and handbag and pocketbook frames and clasps, or commercial compacts and vanity cases, except when made from or embellished with precious metals or precious, semiprecious, synthetic or imitation stones, or the assaying, refining, and smelting of base or precious metals.

(ii) The term "parts" as used in subdivision (i) of this subparagraph does not include parts which are used predominantly for products other than jewelry, such as springs, blades, and nail files. The term "commercial compacts and vanity cases" as used means compacts and vanity cases which bear the trade name or mark of a cosmetic manufacturer and are made for the purpose of distributing or advertising said cosmetics.

(2) The manufacturing, cutting, polishing, encrusting, engraving, and setting of precious, semiprecious, synthetic, and imitation stones.

(3) The manufacturing, drilling, and stringing of pearls, imitation pearls, and beads designed for use in the manufacture of jewelry.

(4) The term "hand-fashioned jewelry" as used in § 530.12(b) means articles of jewelry commonly known as genuine Navajo, Pueblo, Hopi, or Zuni handmade jewelry which in all elements of design, fashioning and ornamentation are handmade by methods and with the help of only such devices as permit the maker to determine the shape and design of each individual product: *Provided,* That silver used in the making of such jewelry shall be of at least nine hundred fineness, and that turquoise and other stones used shall be genuine stones, uncolored and untreated by artificial means: *And provided further,* That power machinery is permitted in the production of findings, in the cutting and polishing of stones, in the buffing and polishing of completed products, and in incidental functions. Equipment specifically prohibited shall include hand presses, foot presses, drop hammers, and similar equipment: *And provided further,* That solder may be of less silver content than nine hundred; *And provided further,* That findings may be mechanically made of any metal by Indians or others: *And provided further,* That turquoise and other stones may be cut and polished by Indians or others without restrictions as to methods or equipment used.

(f) The gloves and mittens industry is defined as follows: The production of gloves and mittens from any material or combination of materials, except athletic gloves and mittens.

(g) The button and buckle manufacturing industry is defined as follows: The manufacture of buttons, buckles, and slides, and the manufacture of blanks and parts for such articles from any material except metal, for use on apparel.

(h) The handkerchief manufacturing industry is defined as follows: The manufacture of men's, women's and children's handkerchiefs, plain or ornamented, from any materials.

(i) The embroideries industry is defined as follows: The production of all kinds of hand and machine-made embroideries and ornamental stitchings, including but not by way of limitation, tucking shirring, smocking, hemstitching, hand rolling, fagoting, Bonnez embroidery, appliqueing, crochet beading, hand drawing, machine drawing, rhinestone trimming, sequin trimming, spangle trimming, eyelets, passementerie, pleating, the application of rhinestones and nailheads, stamping and perforating of designs, Schifli embroidery and laces, burnt-out laces and velvets, Swiss handmachine embroidery, thread splitting, embroidery thread cutting, scallop cutting, lace cutting, lace making-up, making-up of embroidered yard goods, straight cutting of embroidery and cutting out of embroidery, embroidery trimmings, bindings (not made in textile establishments), pipings and emblems: *Provided,* That (1) the foregoing when produced or performed by a manufacturer of a garment, fabric or other article for use on such garment, fabric or other article, and (2) the manufacture of covered buttons and buckles, shall not be included.

[24 FR 729, Feb. 3, 1959, as amended at 46 FR 50349, Oct. 9, 1981]

§ 530.2 Restriction of homework.

No work in the industries defined in paragraphs (d) through (i) of § 530.1 shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.2 of this chapter.

(Sec. 11, 52 Stat. 1066; (29 U.S.C. 211) unless otherwise noted; Secretary's Order No. 16-75, 40 FR 55913, December 2, 1975; and Employment Standards Order No. 78-1, 43 FR 51469, November 3, 1978)

[46 FR 50349, Oct. 9, 1981]

§ 530.3 Application on official forms.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefore on forms provided by the Wage and Hour Division. Such forms shall be signed by both the homeworker and the employer.

§ 530.4 Terms and conditions for the issuance of certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour Division, certificates may be issued to the applicant employer authorizing the employment of a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1) (i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because the worker's presence is required to care for an invalid in the home; and

(2) (i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (*a*) April 4, 1942, in the button and buckle manufacturing industry; (*b*) November 2, 1942, in the embroideries industry; (*c*) April 1, 1941, in the gloves and mittens industry; (*d*) October 7, 1942, in the handkerchief manufacturing industry; (*e*) July 1, 1941, in the jewelry manufacturing industry; or (*f*) March 5, 1942, in the women's apparel industry, except that if this requirement shall result in unusual hardship to the individual homeworker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homeworker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[24 FR 729, Feb. 3, 1959, as amended at 43 FR 28470, June 30, 1978; 46 FR 50349, Oct. 9, 1981]

§ 530.5 Investigation.

An investigation may be ordered in any case to obtain additional data or facts. A medical examination of the worker or invalid may be ordered or a certification of facts concerning eligibility for the certificate by designated officers of the State or Federal Government may be required.

§ 530.6 Termination of certificates.

(a) A certificate shall be valid under the terms set forth in the certificate for a period to be designated by the Administrator or his authorized representative. Application for renewal of any certificate shall be filed in the same manner as an original application under this part.

(b) No effective certificate shall expire until action on an application for renewal shall have been finally determined, provided that such application has been properly executed in accordance with the requirements, and filed not less than 15 nor more than 30 days prior to the expiration date. A final determination means either the granting of or initial denial of the application for renewal of a certificate, or withdrawal of the application. A "properly executed" application is one which contains the complete information required on the form.

[24 FR 729, Feb. 3, 1959, as amended at 27 FR 7020, July 25, 1962]

§ 530.7 Revocation and cancellation.

Any certificate may be revoked for cause at any time. Violation of any provision of the Fair Labor Standards Act shall be sufficient grounds for revocation of all certificates issued to an employer, in which event no certificates shall be issued to the offending employer for a period of one year. Before any certificate is cancelled, however, interested parties shall be notified in writing of the facts warranting such cancellation and afforded an opportunity to demonstrate or achieve compliance.

§ 530.8 Preservation of certificates.

A copy of the certificate shall be sent to the homeworker, who shall keep such certificate on the premises on which the work is performed. A copy shall also be sent to the employer, who shall keep this copy on file in the same place at which the worker's employment records are maintained.

§ 530.9 Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in Part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

§ 530.10 Delegation of authority to grant, deny, or cancel a certificate.

The Administrator may from time to time designate and appoint members of the Administrator's staff or State Agencies as his authorized representatives with full power and authority to grant, deny, or cancel homework certificates.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28470, June 30, 1978]

§ 530.11 Petition for review.

Any person aggrieved by the action of an authorized representative of the Administrator in granting or denying a certificate may, within 15 days thereafter or within such additional time as the Administrator for cause shown may allow, file with the Administrator a petition for review of the action of such representative praying for such relief as is desired. Such petition for review, if duly filed, will be acted upon by the Administrator or an authorized representative of the Administrator who took no part in the proceeding being reviewed. All interested parties will be afforded an opportunity to present their views in support of or in opposition to the matters prayed for in the petition.

§ 530.12 Special provisions.

(a) *Gloves and mittens industry.* Any certificate issued to an industrial homeworker by the New York State Department of Labor under paragraph II of Home Work Order No. 4 Restricting Industrial Homework in the Glove Industry, dated June 28, 1941, will be given effect by the Administrator as a certificate permitting the employment of the homeworker under the terms of § 530.4 for the period during which such certificate shall continue in force.

(b) *Jewelry manufacturing industry.* Nothing contained in the regulations in this part shall be construed to prohibit the employment, as homeworkers, of American Indians residing on the Navajo, Pueblo, and Hopi Indian Reservations, who are engaged in producing genuine hand-fashioned jewelry on the Indian reservations mentioned, provided the employment of such homeworker is in conformity with the following conditions:

(1) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall submit in duplicate to the regional office of the Wage and Hour Division for the

region in which the employer's place of business is located, on April 1, August 1, and December 1 of each year, the name and address of such employee engaged during the preceding 4-month period in making hand-fashioned jewelry on Indian reservations;

(2) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall file copies of the piece rates in duplicate with the regional office of the Wage and Hour Division for the region in which the employer's place of business is located on April 1, August 1, and December 1 of each year, and

(3) That each employer of one or more Indian homeworkers engaged in making hand-fashioned jewelry on these Indian reservations shall keep, maintain, and have available for inspection by the Administrator or the Administrator's authorized representative at any time, records and reports showing with respect to each of the homeworkers engaged in making hand-fashioned jewelry on these Indian reservations, the following information:

(i) Name of the homeworker.

(ii) Address of the homeworker.

(iii) Date of birth of the homeworker, if under 19 years of age.

(iv) Description of work performed.

(v) Amount of cash wage payments made to the homeworker for each pay period.

(vi) Date of such payment.

(vii) Schedule of piece rates paid.

These records shall be kept by each employer for each of the employer's homeworkers engaged in making hand-fashioned jewelry on Indian reservations, as provided in this section, in lieu of the records required under §§ 516.2 and 516.31 of this chapter: *Provided, however,* That nothing in this section shall relieve an employer from maintaining all other records required by Part 516 of this chapter.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[24 FR 729, Feb. 3, 1959, as amended at 43 FR 28470, June 30, 1978]

§ 530.13 Petition for amendment of regulations.

Any person wishing an amendment, addition, or revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and reasons for proposing them. If upon inspection of the petition, or upon the Administrator's own motion, the Administrator believes that reasonable cause for amendment of the rules and regulations appears, the Administrator will, unless it is impractical, unnecessary, or contrary to the public interest to do so, either schedule a hearing with due notice to interested persons or make other provisions to afford interested persons opportunity to present their veiws in support of or in opposition to the proposed changes.

(Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913); Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[43 FR 28470, June 30, 1978]

PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Subpart A—Preliminary Matters

Sec.
531.1 Definitions.
531.2 Purpose and scope.

Subpart B—Determinations of "Reasonable Cost" and "Fair Value"; Effects of Collective Bargaining Agreements

531.3 General determinations of "reasonable cost".
531.4 Making determinations of "reasonable cost".
531.5 Making determinations of "fair value".
531.6 Effects of collective bargaining agreements.
531.7 Request for review of tip credit.
531.8 Petitions to issue, amend, or repeal rules, including determinations, under this part.

Subpart C—Interpretations

531.25 Introductory statement.
531.26 Relation to other laws.

BEST DOCUMENT AVAILABLE

HOW PAYMENTS MAY BE MADE

Sec.
531.27 Payment in cash or its equivalent required.
531.28 Restrictions applicable where payment is not in cash or its equivalent.
531.29 Board, lodging, or other facilities.
531.30 "Furnished" to the employee.
531.31 "Customarily" furnished.
531.32 "Other facilities."
531.33 "Reasonable cost"; "fair value".
531.34 Payment in scrip or similar medium not authorized.
531.35 "Free and clear" payment; "kickbacks".

PAYMENT WHERE ADDITIONS OR DEDUCTIONS ARE INVOLVED

531.36 Nonovertime workweeks.
531.37 Overtime workweeks.

PAYMENTS MADE TO PERSONS OTHER THAN EMPLOYEES

531.38 Amounts deducted for taxes.
531.39 Payments to third persons pursuant to court order.
531.40 Payments to employee's assignee.

PAYMENT OF WAGES TO TIPPED EMPLOYEES

531.50 Statutory provisions with respect to tipped employees.
531.51 Conditions for taking tip credits in making wage payments.
531.52 General characteristics of "tips."
531.53 Payments which constitute tips.
531.54 Tip pooling.
531.55 Examples of amounts not received as tips.
531.56 "More than $20 a month in tips."
531.57 Receiving the minimum amount "customarily and regularly."
531.58 Initial and terminal months.
531.59 The tip wage credit.
531.60 Overtime payments.

AUTHORITY: Sec. 3(m), 52 Stat. 1060; sec. 2, 75 Stat. 65; sec. 101, 80 Stat. 830; 29 U.S.C. 203 (m) and (t).

SOURCE: 32 FR 13575, Sept. 28, 1967, unless otherwise noted.

Subpart A—Preliminary Matters

§ 531.1 Definitions.

(a) "Administrator" means the Administrator of the Wage and Hour Division or his authorized representative. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 3(m) of the Act.

(b) "Act" means the Fair Labor Standards Act of 1938, as amended.

§ 531.2 Purpose and scope.

(a) Section 3(m) of the Act defines the term "wage" to include the "reasonable cost", as determined by the Secretary of Labor, to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. In addition, section 3(m) gives the Secretary authority to determine the "fair value." of such facilities on the basis of average cost to the employer or to groups of employers similarly situated, on average value to groups of employees, or other appropriate measures of "fair value." Whenever so determined and when applicable and pertinent, the "fair value" of the facilities involved shall be includable as part of "wages" instead of the actual measure of the costs of those facilities. The section provides, however, that the cost of board, lodging, or other facilities shall not be included as part of "wages" if excluded therefrom by a bona fide collective bargaining agreement. Section 3(m) also provides a method for determining the wage of a tipped employee.

(b) This Part 531 contains any determinations made as to the "reasonable cost" and "fair value" of board, lodging, or other facilities having general application, and describes the procedure whereby determinations having general or particular application may be made. The part also interprets generally the provisions of section 3(m) of the Act, including the term "tipped employee" as defined in section 3(t).

Subpart B—Determinations of "Reasonable Cost" and "Fair Value"; Effects of Collective Bargaining Agreements

§ 531.3 General determinations of "reasonable cost."

(a) The term "reasonable cost" as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) "Reasonable cost" does not include a profit to the employer or to any affiliated person.

(c) Except whenever any determination made under § 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term "depreciation" includes obsolescence.

(d) (1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

§ 531.4 Making determinations of "reasonable cost."

(a) *Procedure.* Upon his own motion or upon the petition of any interested person, the Administrator may determine generally or particularly the "reasonable cost" to an employer of furnishing any employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by the employer to his employees. Notice of proposed determination shall be published in the FEDERAL REGISTER, and interested persons shall be afforded an opportunity to participate through submission of written data, views, or arguments. Such notice shall indicate whether or not an opportunity will be afforded to make oral presentations. Whenever the latter opportunity is afforded, the notice shall specify the time and place of any hearing and the rules governing such proceedings. Consideration shall be given to all relevant matter presented in the adoption of any rule.

(b) *Contents of petitions submitted by interested persons.* Any petition by an employee or an authorized representative of employees, an employer or group of employers, or other interested persons for a determination of "reasonable cost" shall include the following information:

(1) The name and location of the employer's or employers' place or places of business;

(2) A detailed description of the board, lodging, or other facilities furnished by the employer or employers, whether or not these facilities are customarily furnished by the employer or employers, and whether or not they are alleged to constitute "wages";

(3) The charges or deductions made for the facility or facilities by the employer or employers;

(4) When the actual cost of the facility or facilities is known an itemized statement of such cost to the employer or employers of the furnished facility or facilities;

(5) The cash wages paid;

(6) The reason or reasons for which the determination is requested, including any reason or reasons why the determinations in § 531.3 should not apply; and

(7) Whether an opportunity to make an oral presentation is requested; and if it is requested, the inclusion of a summary of any expected presentation.

90-097 O—82——9

§ 531.5 Making determinations of "fair value."

(a) *Procedure.* The procedures governing the making of determinations of the "fair value" of board, lodging, or other facilities for defined classes of employees and in defined areas under section 3(m) of the Act shall be the same as that prescribed in § 531.4 with respect to determinations of "reasonable cost."

(b) *Petitions of interested persons.* Any petition by an employee or an authorized representative of employees, an employer or group of employers, or other interested persons for a determination of "fair value" under section 3(m) of the Act shall contain the information required under paragraph (b) of § 531.4, and in addition, to the extent possible, the following:

(1) A proposed definition of the class or classes of employees involved;

(2) A proposed definition of the area to which any requested determination would apply;

(3) Any measure of "fair value" of the furnished facilities which may be appropriate in addition to the cost of such facilities.

§ 531.6 Effects of collective bargaining agreements.

(a) The cost of board, lodging, or other facilities shall not be included as part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

(b) A collective bargaining agreement shall be deemed to be "bona fide" when it is made with a labor organization which has been certified pursuant to the provision of section 7(b)(1) or 7(b)(2) of the Act by the National Labor Relations Board, or which is the certified representative of the employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended.

(c) Collective bargaining agreements made with representatives who have not been so certified will be ruled on individually upon submission to the Administrator.

§ 531.7 Request for review of tip credit.

(a) Any employee (either himself or acting through his representative) may request the Administrator to determine whether the actual amount of tips received by him is less than the amount determined by the employer as a wage credit. If it is shown to the satisfaction of the Administrator that the actual amount of tips is the lesser of these amounts, the amount paid the employee by the employer shall be deemed to have been increased by such lesser amount.

(b) Requests for review and determination may be made either orally or in writing to any investigator or any regional, district, or field office of the Wage and Hour Division or to the Administrator in Washington, D.C. 20210. Requests should be accompanied by a statement of tips received each week or each month over a representative period as reported by the employee to the employer for purposes of Internal Revenue Service reports. Such a request should also be accompanied by a statement showing the tip credit taken by the employer and any other information deemed pertinent by the petitioner. In any instance in which it appears that the tip credit claimed by the employer exceeds the amount of tips actually received by the tipped employee, the employer shall be apprised of the facts made available to the Wage and Hour Division and be afforded the opportunity to submit any evidence he may care to present in support of his claim for tip credit before a determination is made. Such determination shall be made by the official representative of the Wage and Hour Division assigned to make an investigation of the employing establishment.

§ 531.8 Petitions to issue, amend, or repeal rules, including determinations, under this part.

Any interested person may petition for the issuance, amendment, or repeal of rules, including determinations under this part. Any such petition shall be directed in writing to the Administrator. Any such petition shall include: (a) A declaration of the petitioner's interest in the proposed action; (b) a statement of the rulemaking action sought; and (c) any data available in support of the petition. Whenever a petitioner seeks determination of "reasonable cost" or "fair value" the statement of rulemaking sought shall contain the information required under § 531.4(b) or § 531.5(b), as the case may be.

Subpart C—Interpretations

§ 531.25 Introductory statement.

(a) The ultimate decisions on interpretations of the Act are made by the courts (*Mitchell* v. *Zachry*, 362 U.S. 310; *Kirschbaum* v. *Walling*, 316 U.S. 517). Court decisions supporting interpretations contained in this subpart are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift*, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorganization Plan 6 of 1950, 64 Stat. 1263; Gen. Order 45A, May 24, 1950, 15 FR 3290). The Supreme Court has recognized that such interpretations of this Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Further, as stated by the Court: "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (*Skidmore* v. *Swift*, 323 U.S. 134.)

(b) The interpretations of the law contained in this subpart are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. The interpretations indicate, with respect to the methods of paying the compensation required by sections 6 and 7 and the application thereto of the provisions of section 3(m) of the Act, the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their administrative duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. Reliance may be placed upon the interpretations as provided in section 10 of the Portal-to-Portal Act (29 U.S.C. 259) so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect. For discussion of section 10 of the Portal-to-Portal Act, see Part 790 of this chapter.

§ 531.26 Relation to other laws.

Various Federal, State, and local legislation requires the payment of wages in cash; prohibits or regulates the issuance of scrip, tokens, credit cards, "dope checks" or coupons; prevents or restricts payment of wages in services or facilities; controls company stores and commissaries; outlaws "kickbacks"; restrains assignment and garnishment of wages; and generally governs the calculation of wages and the frequency and manner of paying them. Where such legislation is applicable and does not contravene the requirements of the Act, nothing in the Act, the regulations, or the interpretations announced by the Administrator should be taken to override or nullify the provisons of of these laws.

HOW PAYMENTS MAY BE MADE

§ 531.27 Payment in cash or its equivalent required.

(a) Standing alone, sections 6 and 7 of the Act require payments of the prescribed wages, including overtime compensation, in cash or negotiable instrument payable at par. Section 3(m) provides, however, for the inclusion in the "wage" paid to any employee, under the conditions which it prescribes of the "reasonable cost," or "fair value" as determined by the Secretary, of furnishing such employee with board, lodging, or other facilities. In addition, section 3(m) provides that a tipped employee's wages may consist in part of tips. It is section 3(m) which permits and governs the payment of wages in other than cash.

(b) It should not be assumed that because the term "wage" does not appear in section 7, all overtime compensation must be paid in cash and may not be paid in board, lodging, or other facilities. There appears to be no evidence in either the statute or its legislative history which demonstrates the intention to provide one rule for the payment of the minimum wage and another rule for the payment of overtime compensation. The principles stated in paragraph (a) of this section are considered equally applicable to payment of the minimum hourly wage required by section 6 or of the wages required by the equal pay provisions of section 6(d), and to payment, when overtime is worked, of the compensation required by section 7. Thus, in determining whether he has met the minimum wage and overtime requirements of the Act, the employer may credit himself with the reasonable cost to himself of board, lodging, or other facilities customarily furnished by him to his employees when the cost of such board, lodging, or other facilities is not excluded from wages paid to such employees under the term of a bona fide collective bargaining agreement applicable to the employees. Unless the context clearly indicates otherwise, the term "wage" is used in this part to designate the amount due under either section 6 or section 7 without distinction. It should be remembered, however, that the wage paid for a job, within the meaning of the equal pay provisions of section 6(d), may include remuneration for employment which is not included in the employee's regular rate of pay under section 7(e) of the act or is not allocable to compensation for hours of work required by the minimum wage provisions of section 6. Reference should be made to Parts 778 and 800 of this chapter for a more detailed discussion of the applicable principles.

(c) Tips may be credited or offset against the wages payable under the Act in certain circumstances, as discussed later in this subpart. See also the recordkeeping requirements contained in Part 516 of this chapter.

§ 531.28 Restrictions applicable where payment is not in cash or its equivalent.

It appears to have been the clear intention of Congress to protect the basic minimum wage and overtime compensation required to be paid to the employee by sections 6 and 7 of the Act from profiteering or manipulation by the employer in dealings with the employee. Section 3(m) of the Act and Subpart B of this part accordingly prescribe certain limitations and safeguards which control the payment of wages in other than cash or its equivalent. (Special recordkeeping requirements must also be met. These are contained in Part 516 of this chapter.) These provisions, it should be emphasized, do not prohibit payment of wages in facilities furnished either as additions to a stipulated wage or as items for which deductions from the stipulated wage will be made; they prohibit only the use of such a medium of payment to avoid the obligation imposed by sections 6 and 7.

§ 531.29 Board, lodging, or other facilities.

Section 3(m) applies to both of the following situations: (a) Where board, lodging, or other facilities are furnished in addition to a stipulated wage; and (b) where charges for board, lodging, or other facilities are deducted from a stipulated wage. The use of the word "furnishing" and the legislative history of section 3(m) clearly indicate that this section was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages.

§ 531.30 "Furnished" to the employee.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily "furnished" to the employee. Not only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced. See *Williams* v. *Atlantic Coast Line Railroad Co.* (E.D.N.C.). 1 W.H. Cases 289.

§ 531.31 "Customarily" furnished.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation in the same or similar communities. See *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812 (C.A. 9), cert. denied, 327 U.S. 803; *Southern Pacific Co.* v. *Joint Council* (C.A. 9) 7 W.H. Cases 536. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished.

§ 531.32 "Other facilities."

(a) "Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.

(b) Shares of capital stock in an employer company, representing only a contingent proprietary right to participate in profits and losses or in the assets of the company at some future dissolution date, do not appear to be "facilities" within the meaning of the section.

(c) It should also be noted that under § 531.3(d)(1), the cost of furnishing "facilities" which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in § 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" within the meaning of section 3(m) include: Safety caps, explosives, and miners' lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; "dues" to chambers of commerce and other organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts, or similar Federal, State, or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses such as "supper money," "travel expenses," etc., see § 778.217 of this chapter.

§ 531.33 "Reasonable cost"; "fair value."

(a) Section 3(m) directs the Administrator to determine "the reasonable cost * * * to the employer of furnishing * * * facilities" to the employee, and in addition it authorizes him to determine "the fair value" of such facilities for defined classes of employees and in defined areas, which may be used in lieu of the actual measure of the cost of such facilities in ascertaining the "wages" paid to any employee. Subpart B contains three methods whereby an employer may ascertain whether any furnished facilities are a part of "wages" within the meaning of section 3(m): (1) An employer may calculate the "reasonable cost" of facilities in accordance with the requirements set forth in § 531.3; (2) an employer may request that a determination of "reasonable cost" be made, including a determination having particular application; and (3) an employer may request that a determination of "fair value" of the furnished facilities be made to be used in lieu of the actual measure of the cost of the furnished facilities in assessing the "wages" paid to an employee.

(b) "Reasonable cost," as determined in § 531.3 "does not include a profit to the employer or to any affiliated person." Although the question of affiliation is one of fact, where any of the following persons operate company stores or commissaries or furnish lodging or other facilities they will normally be deemed "affiliated persons" within the meaning of the regulations: (1) A spouse, child, parent, or other close relative of the employer; (2) a partner, officer, or employee in the employer company or firm; (3) a parent, subsidiary, or otherwise closely connected corporation; and (4) an agent of the employer.

§ 531.34 Payment in scrip or similar medium not authorized.

Scrip, tokens, credit cards, "dope checks," coupons, and similar devices are not proper mediums of payment under the Act. They are neither cash nor "other facilities" within the meaning of section 3(m). However, the use of such devices for the purpose of conveniently and accurately measuring wages earned or facilities furnished during a single pay period is not prohibited. Piecework earnings, for example, may be calculated by issuing tokens (representing a fixed amount of work performed) to the employee, which are redeemed at the end of the pay period for cash. The tokens do not discharge the obligation of the employer to pay wages, but they may enable him to determine the amount of cash which is due to the employee. Similarly, board, lodging, or other facilities may be furnished during the pay period in exchange for scrip or coupons issued prior to the end of the pay period. The reasonable cost of furnishing such facilities may be included as part of the wage, since payment is being made not in scrip but in facilities furnished under the requirements of section 3(m). But the employer may not credit himself with "unused scrip" or "coupons outstanding" on the pay day in determining whether he has met the requirements of the Act because such scrip or coupons have not been redeemed for cash or facilities within the pay period. Similarly, the employee cannot be charged with the loss or destruction of scrip or tokens.

§ 531.35 "Free and clear" payment; "kickbacks."

Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

PAYMENT WHERE ADDITIONS OR DEDUCTIONS ARE INVOLVED

§ 531.36 Nonovertime workweeks.

(a) When no overtime is worked by the employees, section 3(m) and this part apply only to the applicable minimum wage for all hours worked. To illustrate, where an employee works 40 hours a week at a cash wage rate of $1.60 an hour in a situation when that rate is the applicable minimum wage and is paid $64 in cash free and clear at the end of the workweek, and in addition is furnished facilities valued at $4, no consideration need be given to the question of whether such facilities meet the requirements of section 3(m) and this part, since the employee has received in cash the applicable minimum wage of $1.60 an hour for all hours worked. Similarly, where an employee is employed at a rate of $1.80 an hour and during a particular workweek works 40 hours for which he is paid $64 in cash, the employer having deducted $8 from his wages for facilities furnished, whether such deduction meets the requirement of section 3(m) and Subpart B of this part need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage of $1.60 an hour. Deductions for board, lodging, or other facilities may be made in nonovertime workweeks even if they reduce the cash wage below the minimum, provided the prices charged do not exceed the "reasonable cost" of such facilities. When such items are furnished the employee at a profit, the deductions from wages in weeks in which no overtime is worked are considered to be illegal only to the extent that the profit reduces the wage (which includes the "reasonable cost" of the facilities) below the required minimum. Accordingly, in a situation when $1.60 an hour is the applicable minimum wage, if an employee employed at a rate of $1.65 an hour works 40 hours in a workweek and is paid only $54 in cash, $12 having been deducted for facilities furnished to him, such facilities must be measured by the requirements of section 3(m) and this part to determine if the employee has received the minimum of $64 (40 hours × $1.60) in cash or in facilities which may be legitimately included in "wages" payable under the Act. The same would be true where an employee is furnished the facilities in addition to a cash wage of $54 for 40 hours of work. In either case, if the "reasonable cost" to the employer of legitimate facilities equals at least $10 the requirements of the Act are met. Cf. *Southern Pacific Co.* v. *Joint Council Dining Car Employees*, 165 F. (2d) 26 (C.A. 9).

(b) Deductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute "board, lodging, or other facilities" may likewise be made in nonovertime workweeks if the employee nevertheless received the required minimum wage in cash free and clear; but to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act, they are illegal.

§ 531.37 Overtime workweeks.

(a) Section 7 requires that the employee receive compensation for overtime hours at "a rate of not less than one and one-half times the regular rate at which he is employed." When overtime is worked by an employee who receives the whole or part of his wage in facilities and it becomes necessary to determine the portion of his wages represented by facilities, all such facilities must be measured by the requirements of section 3(m) and Subpart B of this part. It is the Administrator's opinion that deductions may be made, however, on the same basis in an overtime workweek as in nonovertime workweeks (see § 531.36), if their purpose and effect are not to evade the overtime requirements of the Act or other law, providing the amount deducted does not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek. For example, in a situation where $1.60 an hour is the applicable minimum wage, if an employee is employed at a rate of $1.65 an hour (5 cents in excess of the minimum wage) the maximum amount which may be deducted from his wages in a 40-hour workweek for items such as tools, dynamite caps, miners' lamps, or other articles which are not "facilities" within the meaning of the Act, is 40 times 5 cents or $2 (see § 531.36). Deductions in excess of this amount for such articles are illegal in overtime workweeks as well as in nonovertime workweeks. There is no limit on the amount which may be deducted for "board, lodging, or other facilities" in overtime workweeks (as in workweeks when no overtime is worked), provided that these deductions are made only for the "reasonable cost" of the items furnished. When such items are furnished at a profit, the amount of the profit (plus the full amount of any deductions for articles which are not facilities) may not exceed $2 in the example heretofore used in this paragraph. These principles assume a situation where bona fide deductions are made for particular items in accordance with the agreement or understanding of the parties. If the situation is solely one of refusal or failure to pay the full amount of wages required by section 7, these principles have no application. Deductions made only in overtime workweeks, or increases in the prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade the overtime requirements of the Act.

(b) Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as addition to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay. See *Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812 (C.A. 9), cert. denied, 327 U.S. 803. Thus, suppose an employee employed at a cash rate of $2 an hour, whose maximum nonovertime workweek under section 7(a) of the Act is 40 hours, works 44 hours during a particular workweek. If, in addition, he is furnished board, lodging, or other facilities valued at $16, but whose "reasonable cost" is $11, the $11 must be added to his cash straight-time pay of $88 ($2 × 44 hours) in determining the regular rate of pay on which his overtime compensation is to be calculated. The regular rate then becomes $2.25 an hour (($88+$11=$99)÷(44 hours)=$2.25 an hour). The employee is thus entitled to receive a total of $103.50 for the week ((40 hours × $2.25=$90)+(4 hours × $3.37 ½ =$13.50)). In addition to the straight-time pay of $88 in cash and $11 in facilities, extra compensation of $4.50 in cash for the 4 overtime hours must, therefore, be paid by the employer, to meet the requirements of the Act.

PAYMENTS MADE TO PERSONS OTHER THAN EMPLOYEES

§ 531.38 Amounts deducted for taxes.

Taxes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as "wages" although they do not technically constitute "board, lodging, or other facilities" within the meaning of section 3(m). This principle is applicable to the employee's share of social security and State unemployment insurance taxes, as well as other Federal, State, or local taxes, levies, and assessments. No deduction may be made for any tax or share of a tax which the law requires to be borne by the employer.

§ 531.39 Payments to third persons pursuant to court order.

(a) Where an employer is legally obliged, as by order of a court of competent and appropriate jurisdiction, to pay a sum for the benefit or credit of the employee to a creditor of the employee, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceeding, deduction from wages of the actual sum so paid is not prohibited: *Provided*, That neither the employer nor any person acting in his behalf or interest derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for the purposes of the Act, to payment to the employee.

(b) The amount of any individual's earnings withheld by means of any legal or equitable procedure for the payment of any debt may not exceed the restriction imposed by section 303(a), title III, Restriction on Garnishment, of the Consumer Credit Protection Act (82 Stat. 163, 164; 15 U.S.C. 1671 et seq.). The application of title III is discussed in Part 870 of this chapter. When the payment to a third person of moneys withheld pursuant to a court order under which the withholdings exceeds that permitted by the CCPA, the excess will not be considered equivalent to payment of wages to the employee for purpose of the Fair Labor Standards Act.

[35 FR 10757, July 2, 1970]

§ 531.40 Payments to employee's assignee.

(a) Where an employer is directed by a voluntary assignment or order of his employee to pay a sum for the benefit of the employee to a creditor, donee, or other third party, deduction from wages of the actual sum so paid is not prohibited: *Provided*, That neither the employer nor any person acting in his behalf or interest, directly or indirectly, derives any profit or benefit from the transaction. In such case, payment to the third person for the benefit and credit of the employee will be considered equivalent, for purposes of the Act, to payment to the employee.

(b) No payment by the employer to a third party will be recognized as a valid payment of compensation required under the Act where it appears that such payment was part of a plan or arrangement to evade or circumvent the requirements of section 3(m) or Subpart B of this part. For the protection of both employer and employee it is suggested that full and adequate record of all assignments and orders be kept and preserved and that provisions of the applicable State law with respect to signing, sealing, witnessing, and delivery be observed.

(c) Under the principles stated in paragraphs (a) and (b) of this section, employers have been permitted to treat as payments to employees for purposes of the Act sums paid at the employees' direction to third persons for the following purposes: Sums paid, as authorized by the employee, for the purchase in his behalf of U.S. savings stamps or U.S. savings bonds; union dues paid pursuant to a collective bargaining agreement with bona fide representatives of the employees and as permitted by law; employees' store accounts with merchants wholly independent of the employer; insurance premiums (paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it); voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit directly or indirectly.

PAYMENT OF WAGES TO TIPPED EMPLOYEES

§ 531.50 Statutory provisions with respect to tipped employees.

(a) With respect to tipped employees, section 3(m) provides:

> In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

(b) "Tipped employee" is defined in section 3(t) of the Act as follows:

> "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

§ 531.51 Conditions for taking tip credits in making wage payments.

The wage credit permitted on account of tips under section 3(m) may be taken only with respect to wage payments made under the Act to those employees whose occupations in the workweeks for which such payments are made are those of "tipped employees" as defined in section 3(t). Under section 3(t), the occupation of the employee must be one "in which he customarily and regularly receives more than $20 a month in tips." To determine whether a tip credit may be taken in paying wages to a particular employee it is necessary to know what payments constitute "tips," whether the employee receives "more than $20 a month" in such payments in the occupation in which he is engaged, and whether in such occupation he receives these payments in such amount "customarily and regularly." The principles applicable to a resolution of these questions are discussed in the following sections.

§ 531.52 General characteristics of "tips."

A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, and generally he has the right to determine who shall be the recipient of his gratuity. In the absence of an agreement to the contrary between the recipient and a third party, a tip becomes the property of the person in recognition of whose service it is presented by the customer. Only tips actually received by an employee as money belonging to him which he may use as he chooses free of any control by the employer, may be counted in determining whether he is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

§ 531.53 Payments which constitute tips.

In addition to cash sums presented by customers which an employee keeps as his own, tips received by an employee include, within the meaning of the Act, amounts paid by bank check or other negotiable instrument payble at par and amounts transferred by the employer to the employee pursuant to directions from credit customers who designate amounts to be added to their bills as tips. Special gifts in forms other than money or its equivalent as above described such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of the Act.

§ 531.54 Tip pooling.

Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them, in applying the provisions of section 3(m) and 3(t). Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act.

§ 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 10 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received. Likewise, where the employment agreement is such that amounts presented by customers as tips belong to the employer and must be credited or turned over to him, the employee is in effect collecting for his employer additional income from the operations of the latter's establishment. Even though such amounts are not collected by imposition of any compulsory charge on the customer, plainly the employee is not receiving tips within the meaning of section 3(m) and 3(t).

The amounts received from customers are the employer's property, not his, and do not constitute tip income to the employee.

(b) As stated above, service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. However, where such sums are distributed by the employer to his employees, they may be used in their entirety to satisfy the monetary requirements of the Act. Also, if pursuant to an employment agreement the tips received by an employee must be credited or turned over to the employer, such sums may, after receipt by the employer, be used by the employer to satisfy the monetary requirements of the Act. In such instances, there is no applicability of the 50-percent limitation on tip credits provided by section 3(m).

§ 531.56 "More than $20 a month in tips."

(a) *In general.* An employee who receives tips, within the meaning of the Act, is a "tipped employee" under the definition in section 3(t) when, in the occupation in which he is engaged, the amounts he receives as tips customarily and regularly total "more than $20 a month." An employee employed in an occupation in which the tips he receives meet this minimum standard is a "tipped employee" for whom the wage credit provided by section 3(m) may be taken in computing the compensation due him under the Act for employment in such occupation, whether he is employed in it full time or part time. An employee employed full time or part time in an occupation in which he does not receive more than $20 a month in tips customarily and regularly is not a "tipped employee" within the meaning of the Act and must receive the full compensation required by its provisions in cash or allowable facilities without any deduction for tips received under the provisions of section 3(m).

(b) *Month.* The definition of tipped employee does not require that the calendar month be used in determining whether more than $20 a month is customarily and regularly received as tips. Any appropriate recurring monthly period beginning on the same day of the calendar month may be used.

(c) *Individual tip receipts are controlling.* An employee must himself customarily and regularly receive more than $20 a month in tips in order to qualify as a tipped employee. The fact that he is part of a group which has a record of receiving more than $20 a month in tips will not qualify him. For example, a waitress who is newly hired will not be considered a tipped employee merely because the other waitresses in the establishment receive tips in the requisite amount. For the method of applying the test in initial and terminal months of employment, see § 531.58.

(d) *Significance of minimum monthly tip receipts.* More than $20 a month in tips customarily and regularly received by the employee is a minimum standard that must be met before any wage credit for tips is determined under section 3(m). It does not govern or limit the determination by the employer or the Secretary of Labor of the appropriate amount (up to 50 percent of the minimum wage) of wage credit under section 3(m) that may be taken for tips.

(e) *Dual jobs.* In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least $20 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.

§ 531.57 Receiving the minimum amount "customarily and regularly."

The employee must receive more than $20 a month in tips "customarily and regularly" in the occupation in which he is engaged in order to qualify as a tipped employee under section 3(t). If it is known that he always receives more than the stipulated amount each month, as may be the case with many employees in occupations such as those of waiters, bellhops, taxicab drivers, barbers, or beauty operators, the employee will qualify and the tip credit provisions of section 3(m) may be applied. On the other hand, an employee who only occasionally or sporadically receives tips totaling more than $20 a month, such as at Christmas or New Years when customers may be more generous than usual, will not be deemed a tipped employee. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional, but which may be less than constant. If an employee is in an occupation in which he normally and recurrently receives more than $20 a month in tips, he will be considered a tipped employee even though occasionally because of sickness, vacation, seasonal fluctuations or the like, he fails to receive more than $20 in tips in a particular month.

§ 531.58 Initial and terminal months.

An exception to the requirement that an employee, whether full-time, part-time, permanent or temporary, will qualify as a tipped employee only if he customarily and regularly receives more than $20 a month in tips is made in the case of initial and terminal months of employment. In such months the purpose of the provision for tipped employees would seem fulfilled if qualification as a tipped employee is based on his receipt of tips in the particular week or weeks of such month at a rate in excess of $20 a month, where the employee has worked less than a month because he started or terminated employment during the month.

§ 531.59 The tip wage credit.

In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m) the amount paid to a tipped employee by an employer is deemed to be increased on account of tips by an amount which cannot exceed 50 percent of the minimum wage applicable to such employee in the workweek for which the wage payment is made. This credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m). The credit allowed on account of tips may be less than 50 percent of the applicable minimum wage; it cannot be more. The actual amount is left by the statute to determination by the employer on the basis of his information concerning the tipping practices and receipts in his establishment. However, section 3(m) provides that an employee who can show to the satisfaction of the Secretary of Labor that the actual amount of tips received by him was less than the amount determined by the employer as a tip credit shall receive an appropriate wage adjustment. See § 531.50(a). As stated in Senate Report No. 1487 (89th Cong. 2d sess.), it is presumed that in the application of this special provision the employee will be receiving at least the maximum tip credit in actual tips: "If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips." Provision is made in § 531.7 for employee requests for review of tip credit determinations made by employers, in the event that the employee considers that the tip credit taken exceeds his actual tips. As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which he qualifies as a "tipped employee." Under employment agreements requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, it is clear from the legislative history that the employer must pay the employee the full minimum hourly wage, since for all practical purposes the employee is not receiving tip income. See also § 531.54.

§ 531.60 Overtime payments.

(a) When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, his regular rate of pay is determined by dividing hs total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. (See Part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer (not in excess of 50 percent of the applicable minimum wage), the reasonable cost or fair value of any facilities furnished him by the employer, as authorized under section 3(m) and this Part 531, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

PART 536—AREA OF PRODUCTION

Sec.

536.1 "Area of production" as used in section 7(c) of the Fair Labor Standards Act.
536.2 "Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act.
536.3 "Area of production" as used in section 13(a)(17) of the Fair Labor Standards Act.
536.4 Petition for amendment of regulations.

Authority: 52 Stat. 1060; 29 U.S.C. 201 et seq., unless otherwise noted.

Source: 27 FR 400, Jan. 13, 1962, unless otherwise noted.

§ 536.1 "Area of production" as used in section 7(c) of the Fair Labor Standards Act.

(a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity during seasonal operations within the "area of production" within the meaning of section 7(c) of the Fair Labor Standards Act if he is so engaged in an establishment which is located in the open country or in a rural community and in which such first processing is performed on commodities 95 percent of which come from normal rural sources of supply located not more than the following airline distances from the establishment:

(1) With respect to grain, soybeans, eggs, or tobacco—50 miles;

(2) With respect to any other agricultural or horticultural commodities—20 miles.

(b) For the purpose of this section:

(1) "Open the country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within:

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or

(ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater, according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the agricultural or horticultural commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a

BEST DOCUMENT AVAILABLE

calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

(Sec. 7(c), 52 Stat. 1063, 29 U.S.C. 207 (c))

§ 536.2 "Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act.

(a) An individual shall be regarded as employed within the "area of production" within the meaning of section 13(a) (10) of the Fair Labor Standards Act in handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air-line distances from the establishment:

(i) With respect to operations on fresh fruit and vegetables—15 miles;

(ii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subparagraph—20 miles;

(iii) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population, or any area within:

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or

(ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater, according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last proceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

(Sec. 12(a) (10), 52 Stat. 1067, 29 U.S.C. 213(a) (10))

§ 536.3 "Area of production" as used in section 13(a)(17) of the Fair Labor Standards Act.

(a) An employee employed by an establishment commonly recognized as a country elevator and having not more than five employees (including such an establishment which sells products and services used in the operation of a farm) shall be regarded as employed within the "area of production," within the meaning of section 13(a)(17) of the Fair Labor Standards Act, if the establishment by which he is employed is located in the open country or in a rural community and 95 percent of the agricultural commodities received by the establishment for storage or for market come from normal rural sources of supply within the following air-line distances from the establishment:

(1) With respect to grain and soybeans—50 miles;

(2) With respect to any other agricultural commodities—20 miles.

(b) For the purpose of this section:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within:

(i) One air-line mile of the city, town, or urban place with a population of 2,500 up to by not including 50,000, or

(ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater, according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

(Sec. 13(a) (17), 52 Stat. 1067, as amended, sec. 9, 75 Stat. 71; 29 U.S.C. 213 (a) (17))

§ 536.4 Petition for amendment of regulations.

Any interested person or association wishing a revision of any section of this part may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with notice to interested parties or will make other provisions for affording interested parties an opportunity to present their views in support of or opposition to the proposed change.

PART 541—DEFINING, AND DELIMITING THE TERMS "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY (INCLUDING ANY EMPLOYEE EMPLOYED IN THE CAPACITY OF ACADEMIC ADMINISTRATIVE PERSONNEL OR TEACHER IN ELEMENTARY OR SECONDARY SCHOOLS), OR IN THE CAPACITY OF OUTSIDE SALESMAN"

NOTE: The President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), directed Federal agencies to postpone for sixty days from January 29, 1981, the effective date of all regulations that they had promulgated in final form and had scheduled to become effective during such sixty day period.

Several sections in Part 541 were revised at 46 FR 3013, Jan. 13, 1981 and the effective date subsequently postponed. For further explanation, see the notes following the text of affected sections.

Subpart A—General Regulations

Sec.
541.0 Terms used in regulations.
541.1 Executive.
541.2 Administrative.
541.3 Professional.
541.5 Outside salesman.
541.5a Special provision for motion picture producing industry.
541.5b Equal pay provisions of section 6(d) of the act apply to executive, administrative, and professional employees, and to outside salesmen.
541.6 Petition for amendment of regulations.
541.52 Special provision for motion picture producing industry.

Subpart B—Interpretations

541.99 Introductory statement.

EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE CAPACITY

541.101 General.
541.102 Management.
541.103 Primary duty.
541.104 Department or subdivision.
541.105 Two or more other employees.
541.106 Authority to hire or fire.
541.107 Discretionary powers.
541.108 Work directly and closely related.
541.109 Emergencies.
541.110 Occasional tasks.
541.111 Nonexempt work generally.
541.112 Percentage limitations on nonexempt work.
541.113 Sole-charge exception.
541.114 Exception for owners of 20-percent interest.
541.115 Working foremen.
541.116 Trainees, executive.
541.117 Amount of salary required.
541.118 Salary basis.
541.119 Special proviso for high salaried executives.

EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY

541.201 Types of administrative employees.
541.202 Categories of work.
541.203 Nonmanual work.
541.205 Directly related to management policies or general business operations.
541.206 Primary duty.
541.207 Discretion and independent judgment.
541.208 Directly and closely related.
Sec.
541.209 Percentage limitations on nonexempt work.
541.210 Trainees, administrative.
541.211 Amount of salary or fees required.
541.212 Salary basis.
541.213 Fee basis.
541.214 Special proviso for high salaried administrative employees.
541.215 Elementary or secondary schools and other educational establishments and institutions.

EMPLOYEE EMPLOYED IN A BONA FIDE PROFESSIONAL CAPACITY

541.301 General.
541.302 Learned professions.
541.303 Artistic professions.
541.304 Primary duty.
541.305 Discretion and judgment.
541.306 Predominantly intellectual and varied.
541.307 Essential part of and necessarily incident to.
541.308 Nonexempt work generally.
541.309 20-percent nonexempt work limitation.
541.310 Trainees, professional.
541.311 Amount of salary or fees required.
541.312 Salary basis.
541.313 Fee basis.
541.314 Exception for physicians, lawyers, and teachers.
541.315 Special proviso for high salaried professional employees.

EMPLOYEE EMPLOYED IN THE CAPACITY OF OUTSIDE SALESMAN

541.500 Definition of "outside salesman."
541.501 Making sales or obtaining orders.
541.502 Away from his employer's place of business.
541.503 Incidental to and in conjunction with sales work.
541.504 Promotion work.
541.505 Driver salesmen.
541.506 Nonexempt work generally.
541.507 20-percent limitation on nonexempt work.
541.508 Trainees, outside salesmen.

SPECIAL PROBLEMS

541.600 Combination exemptions.
541.601 Special provision for motion picture producing industry.
541.602 Special proviso concerning executive and administative employees in multi-store retailing operations.
OCCUPATIONAL INDEX

AUTHORITY: Sec. 13, 52 Stat. 1067, as amended; 29 U.S.C. 213; Reorganization Plan No. 6 of 1950 (3 CFR 1945-53 comp. p. 1004); Secretary's Order No. 13-71 (3 CFR 8755), and Employment Standards Order 1-74 (39 FR 33841).

BEST DOCUMENT AVAILABLE

SOURCE: 38 FR 11390, May 7, 1973, unless otherwise noted.

Subpart A—General Regulations

§ 541.0 Terms used in regulations.

(a) "Administrator" means the Administrator of the Wage and Hour Division, U.S. Department of Labor. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 13(a)(1) of the Fair Labor Standards Act.

(b) "Act" means the Fair Labor Standards Act of 1938, as amended.

§ 541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13(a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Postponed Regulations: Paragraph (f) in § 541.1 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11974, Feb. 12, 1981.

The text of paragraph (f) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.1 Executive.

* * * * *

(f) Who is compensated for his services on a salary basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 (or $180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983. If employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: PROVIDED, That an employee who is compensated on a salary basis at a rate of not less than $320 per week beginning February 13 1981 and $345 per week beginning February 13, 1983 (or $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction

BEST DOCUMENT AVAILABLE

of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

§ 541.2 Administrative.

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e) (1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Postponed Regulations: Paragraph (e) in § 541.2 was revised at 46 FR 3013, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.2 Administrative.

* * * * *

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 ($180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 ($260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983, if employed by other than the Federal Government in Puerto

Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

§ 541.3 Professional.

The term "employee employed in a bona fide * * * professional capacity" in section 13(a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week ($150 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Postponed Regulations: Paragraph (e) in § 541.3 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (e) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.3 Professional.

* * * * *

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $250 per week beginning February 13, 1981 and $280 per week beginning February 13, 1983 ($225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 (or $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983 if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a) (1) or (3) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

§ 541.5 Outside salesman.

The term "employee employed * * * in the capacity of outside salesman" in section 13(a) (1) of the act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of the act, or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a) (1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

§ 541.5a Special provision for motion picture producing industry.

The requirement of §§ 541.1, 541.2, and 541.3 that the employee be paid "on a salary basis" shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $200 a week (exclusive of board, lodging, or other facilities).

Postponed Regulations: Section 541.5a was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.5a set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.5a Special provision for motion picture producing industry.

The requirement of §§ 541.1, 541.2, and 541.3 that the employee be paid "on a salary basis" shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 (exclusive of board, lodging, or other facilities).

§ 541.5b Equal pay provisions of section 6(d) of the act apply to executive, administrative, and professional employees, and to outside salesmen.

Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or

BEST DOCUMENT AVAILABLE

teacher in elementary or secondary schools), or in the capacity of outside salesmen under section 13(a)(1) of the act. Thus, for example, where an exempt administrative employee and another employee of the establishment are performing substantially "equal work," the sex discrimination prohibitions of section 6(d) are applicable with respect to any wage differential between those two employees.

§ 541.6 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes. In determining such future regulations, separate treatment for different industries and for different classes of employees may be given consideration.

§ 541.52 Special provision for motion picture producing industry.

The requirements of §§ 541.1, 541.2, and 541.3 that the employee be paid "on a salary basis" shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $250 a week (exclusive of board, lodging, or other facilities).

[40 FR 7092, Feb. 19, 1975]

Postponed Regulations: Section 541.52 was removed at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date of the removal was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.52 set forth above remains in effect pending further action by the issuing agency.

Subpart B—Interpretations

§ 541.99 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, exempts from the wage and hour provisions of the act "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 percent of his hours worked in the workweek are devoted to such activities)." The requirements of the exemption under this section of the act are contained in subpart A of this part.

EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE CAPACITY

§ 541.101 General.

The duties and responsibilities of an exempt executive employee are described in paragraphs (a) through (d) of § 541.1. Paragraph (e) of § 541.1 contains among other things, percentage limitations on the amount of time which an employee may devote to activities "which are not directly and closely related to the performance of the work described in paragraphs (a) through (d)" of that section. For convenience in discussion, the work described in paragraphs (a) through (d) of § 541.1 and the activities directly and closely related to such work will be referred to as "exempt" work, while other activities will be referred to as "nonexempt" work.

BEST DOCUMENT AVAILABLE

§ 541.102 Management.

(a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.

(b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

§ 541.103 Primary duty.

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programers and who performs the more complex or responsible jobs in programing will be considered to have management as his primary duty.

§ 541.104 Department or subdivision.

(a) In order to qualify under § 541.1, the employee's managerial duties must be performed with respect to the enterprise in which he is employed or a customarily recognized department or subdivision thereof. The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of men assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. In order properly to classify an individual as an executive he must be more than merely a supervisor of two or more employees; nor is it sufficient that he merely participates in the management of the unit. He must be in charge of and have as his primary duty the management of a recognized unit which has a continuing function.

(b) In the vast majority of cases there is no difficulty in determining whether an individual is in charge of a customarily recognized department or subdivision of a department. For example, it is clear that where an enterprise comprises more than one establishment, the employee in charge of each establishment may be considered in charge of a subdivision of the enterprise. Questions arise principally in cases involving supervisors who work outside the employer's establishment, move from place to place, or have different subordinates at different times.

(c) In such instances, in determining whether the employee is in charge of a recognized unit with a continuing function, it is the division's position that the unit supervised need not be physically within the employer's establishment and may move from place to place, and that continuity of the same subordinate personnel is not absolutely essential to the existence of a recognized unit with a continuing function, although in the ordinary case a fixed location and continuity of personnel are both helpful in establishing the existence of such a unit. The following examples will illustrate these points.

(d) The projects on which an individual in charge of a certain type of construction work is employed may occur at different locations, and he may even hire most of his workforce at these locations. The mere fact that he moves his location would not invalidate his exemption if there are other factors which show that he is actually in charge of a recognized unit with a continuing function in the organization.

(e) Nor will an otherwise exempt employee lose the exemption merely because he draws the men under his supervision from a pool, if other factors are present which indicate that he is in charge of a recognized unit with a continuing function. For instance, if this employee is in charge of the unit which has the continuing responsibility for making all installations for his employer, or all installations in a particular city or a designated portion of a city, he would be in charge of a department or subdivision despite the fact that he draws his subordinates from a pool of available men.

(f) It cannot be said, however, that a supervisor drawn from a pool of supervisors who supervises employees assigned to him from a pool and who is assigned a job or series of jobs from day to day or week to week has the status of an executive. Such an employee is not in charge of a recognized unit with a continuing function.

§ 541.105 Two or more other employees.

(a) An employee will qualify as an "executive" under § 541.1 only if he customarily and regularly supervises at least two full-time employees or the equivalent. For example, if the "executive" supervises one full-time and two part-time employees of whom one works morning and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met.

(b) The employees supervised must be employed in the department which the "executive" is managing.

(c) It has been the experience of the divisions that a supervisor of a few as two employees usually performs nonexempt work in excess of the general 20-percent tolerance provided in § 541.1.

(d) In a large machine shop there may be a machine-shop supervisor and two assistant machine-shop supervisors. Assuming that they meet all the other qualifications § 541.1 and particularly that they are not working foremen, they should certainly qualify for the exemption. A small department in a plant or in an office is usually supervised by one person. Any attempt to classify one of the other workers in the department as an executive merely by giving him an honorific title such as assistant supervisor will almost inevitably fail as there will not be sufficient true supervisory or other managerial work to keep two persons occupied. On the other hand, it is incorrect to assume that in a large department, such as a large shoe department in a retail store which has separate sections for men's, women's, and children's shoes, for example, the supervision cannot be distributed among two or three employees, conceivably among more. In such instances, assuming that the other tests are met, especially the one concerning the performance of nonexempt work, each such employee "customarily and regularly directs the work of two or more other employees therein."

(e) An employee who merely assists the manager or buyer of a particular department and supervises two or more employees only in the actual manager's or buyer's absence, however, does not meet this requirement. For example, where a single unsegregated department, such as a women's sportswear department or a men's shirt department in a retail store, is managed by a buyer, with the assistance of one or more assistant buyers, only one employee, the buyer, can be considered an executive, even though the assistant buyers at times exercise some managerial and supervisory responsibilities. A shared responsibility for the supervision of the same two or more employees in the same department does not satisfy the requirement that the employee "customarily and regularly directs the work of two or more employees therein."

§ 541.106 Authority to hire or fire.

Section 541.1 requires that an exempt executive employee have the authority to hire or fire other employees or that his suggestions and recommendations as to hiring or firing and as to advancement and promotion or any other change of status of the employees who he supervises will be given particular weight. Thus, no employee, whether high or low in the hierarchy of management, can be considered as employed in a bona fide executive capacity unless he is directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to who the hiring and firing functions are delegated.

§ 541.107 Discretionary powers.

(a) Section 541.1(d) requires that an exempt executive employee customarily and regularly exercise discretionary powers. A person whose work is so completly routinized that he has no discretion does not qualify for exemption.

(b) The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.

§ 541.108 Work directly and closely related.

(a) This phrase brings within the category of exempt work not only the actual management of the department and the supervision of the employees therein, but also activities which are closely associated with the performance of the duties involved in such managerial and supervisory functions or responsibilities. The supervision of employees and the management of a department include a great many directly and closely related tasks which are different from the work performed by subordinates and are commonly performed by supervisors because they are helpful in supervising the employees or contribute to the smooth functioning of the department for which they are responsible. Frequently such exempt work is of a kind which in establishments that are organized differently or which are larger and have greater specialization of function, may be performed by a nonexempt employee hired especially for that purpose. Illustration will serve to make clear the meaning to be given the phrase "directly and closely related".

(b) Keeping basic records of working time, for example, is frequently performed by a timekeeper employed for that purpose. In such cases the work is clearly not exempt in nature. In other establishments which are not large enough to employ a timekeeper, or in which the timekeeping function has been decentralized, the supervisor of each department keeps the basic time records of his own subordinates. In these instances, as indicated above, the timekeeping is directly related to the function of managing the particular department and supervising its employees. However, the preparation of a payroll by a supervisor, even the payroll of the employees under his supervision, cannot be considered to be exempt work, since the preparation of a payroll does not aid in the supervision of the employees or the management of the department. Similarly, the keeping by a supervisor of production or sales records of his own subordinates for use in supervision or control would be exempt work, while the maintenance of production records of employees not under his direction would not be exempt work.

(c) Another example of work which may be directly and closely related to the performance of management duties is the distribution of materials or merchandise and supplies. Maintaining control of the flow of materials or merchandise and supplies in a department is ordinarily a responsibility of the managerial employee in charge. In many nonmercantile establishments the actual distribution of materials is performed by nonexempt employees under the supervisor's direction. In other establishments it is not uncommon to leave the actual distribution of materials and supplies in the hands of the supervisor. In such cases it is exempt work since it is directly and closely related to the managerial responsibility of maintaining the flow of materials. In a large retail establishment, however, where the replenishing of stocks of merchandise on the sales floor is customarily assigned to a nonexempt employee, the performance of such work by the manager or buyer of the department is nonexempt. The amount of time the manager or buyer spends in such work must be offset against the statutory tolerance for nonexempt work. The supervision and control of a flow of merchandise to the sales floor, of course, is directly and closely related to the managerial responsibility of the manager or buyer.

(d) Setup work is another illustration of work which may be exempt under certain circumstances if performed by a supervisor. The nature of setup work differs in various industries and for different operations. Some setup work is typically performed by the same employees who perform the "production" work; that is, the employee who operates the machine also "sets it up" or adjusts it for the particular job at hand. Such setup work is part of the production operation and is not exempt. In other instances the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In some plants, particularly large ones, such setup work may be performed by employees whose duties are not supervisory in nature. In other plants, however, particularly small plants, such work is a regular duty of the executive and is directly and closely related to his responsibility for the work performance of his subordinates and for the adequacy of the final product. Under such circumstances it is exempt work. In the data processing field the work of a supervisor when he performs the more complex or more responsible work in a program utilizing several computer programers or computer operators would be exempt activity.

(e) Similarly, a supervisor who spot checks and examines the work of his subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to his managerial and supervisory functions. However, this kind of examining and checking must be distinguished from the kind which is normally performed by an "examiner," "checker," or "inspector," and which is really a production operation rather than a part of the supervisory function. Likewise, a department manager or buyer in a retail or service establishment who goes about the sales floor observing the work of sales personnel under his supervision to determine the effectiveness of their sales techniques, checking on the quality of customer service being given, or observing customer preferences and reactions to the lines, styles, types, colors, and quality of the merchandise offered, is performing work which is directly and closely related to his managerial and supervisory functions. His actual participation, except for supervisory training or demonstration purposes, in such activities as making sales to customers, replenishing stocks of merchandise on the sales floor, removing merchandise from fitting rooms and returning to stock or shelves, however, is not. The amount of time a manager or buyer spends in the performance of such activities must be included in computing the percentage limitation on nonexempt work.

(f) Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which the machinery is largely automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he "keeps an eye out for trouble" is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.

(g) A word of caution is necessary in connection with these illustrations. The recordkeeping, material distributing, setup work, machine watching and adjusting, and inspecting, examining, observing and checking referred to in the examples of exempt work are presumably the kind which are supervisory and managerial functions rather than merely "production" work. Frequently it is difficult to distinguish the managerial type from the type which is a production operation. In deciding such difficult cases it should be borne in mind that it is one of the objectives of § 541.1 to exclude from the definition foremen who hold "dual" or combination jobs. (See discussion of working foremen in § 541.115.) Thus, if work of this kind takes up a large part of the employee's time it would be evidence that management of the department is not the primary duty of the employee, that such work is a production operation rather than a function directly and closely related to the supervisory or managerial duties, and that the employee is in reality a combination foreman-"setup" man, foreman-machine adjuster (or mechanic), or foreman-examiner, floorman-salesperson, etc., rather than a bona fide executive.

§ 541.109 Emergencies.

(a) Under certain occasional emergency conditions, work which is normally performed by nonexempt employees and is nonexempt in nature will be directly and closely related to the performance of the exempt functions of management and supervision and will therefore be exempt work. In effect, this means that a bona fide executive who performs work of a normally nonexempt nature on rare occasions because of the existence of a real emergency will not, because of the performance of such emergency work, lose the exemption. Bona fide executives include among their responsibilities the safety of the employees under their supervision, the preservation and protection of the merchandise, machinery or other property of the department or subdivision in their charge from damage due to unforeseen circumstances, and the prevention of widespread breakdown in production, sales, or service operations. Consequently, when conditions beyond control arise which threaten the safety of the employees, or a cessation of operations, or serious damage to the employer's property, any manual or other normally nonexempt work performed in an effort to prevent such results is considered exempt work and is not included in computing the percentage limitation on nonexempt work.

(b) The rule in paragraph (a) of this section is not applicable, however, to nonexempt work arising out of occurrences which are not beyond control or for which the employer can reasonably provide in the normal course of business.

(c) A few illustrations may be helpful in distinguishing routine work performed as a result of real emergencies of the kind for which no provision can practicably be made by the employer in advance of their occurrence and routine work which is not in this category. It is obvious that a mine superintendent who pitches in after an explosion and digs out the men who are trapped in the mine is still a bona fide executive during that week. On the other hand, the manager of a cleaning establishment who personally performs the cleaning operations on expensive garments because he fears damage to the fabrics if he allows his subordinates to handle them is not performing "emergency" work of the kind which can be considered exempt. Nor is the manager of a department in a retail store performing exempt work when he personally waits on a special or impatient customer because he fears the loss of the sale or the customer's goodwill if he allows a salesperson to serve him. The performance of nonexempt work by executives during inventory-taking, during other periods of heavy workload, or the handling of rush orders are the kinds of activities which the percentage tolerances are intended to cover. For example, pitching in on the production line in a canning plant during seasonal operations is not exempt "emergency" work even if the objective is to keep the food from spoiling. Similarly, pitching in behind the sales counter in a retail store during special sales or during Christmas or Easter or other peak sales periods is not "emergency" work, even if the objective is to improve customer service and the store's sales record. Maintenance work is not emergency work even if performed at night or during weekends. Relieving subordinates during rest or vacation periods cannot be considered in the nature of "emergency" work since the need for replacements can be anticipated. Whether replacing the subordinate at the workbench, or production line, or sales counter during the first day or partial day of an illness would be considered exempt emergency work would depend upon the circumstances in the particular case. Such factors as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly would all have to be weighed.

(d) All the regular cleaning up around machinery, even when necessary to prevent fire or explosion, is not "emergency" work. However, the removal by an executive of dirt or obstructions constituting a hazard to life or property need not be included in computing the percentage limitation if it is not reasonably practicable for anyone but the supervisor to perform the work and it is the kind of "emergency" which has not been recurring. The occasional performance of repair work in case of a breakdown of machinery, or the collapse of a display rack, or damage to or exceptional disarray of merchandise caused by accident or a customer's carelessness may be considered exempt work if the breakdown is one which the employer cannot reasonably anticipate. However, recurring breakdowns or disarrays requiring frequent attention, such as that of an old belt or machine which breaks down repeatedly or merchandise displays constantly requiring resorting or straightening, are the kind for which provision could reasonably be made and repair of which must be considered as nonexempt.

§ 541.110 Occasional tasks.

(a) In addition to the type of work which by its very nature is readily identifiable as being directly and closely related to the performance of the supervisory and management duties, there is another type of work which may be considered directly and closely related to the performance of these duties. In many establishments the proper management of a department requires the performance of a variety of occasional, infrequently recurring tasks which cannot practicably be performed by the production workers and are usually performed by the executive. These small tasks when viewed separately without regard to their relationship to the executive's overall functions might appear to constitute nonexempt work. In reality they are the means of properly carrying out the employee's management functions and responsibilities in connection with men, materials, and production. The particular tasks are not specifically assigned to the "executive" but are performed by him in his discretion.

(b) It might be possible for the executive to take one of his subordinates away from his usual tasks, instruct and direct him in the work to be done, and wait for him to finish it. It would certainly not be practicable, however, to manage a department in this fashion. With respect to such occasional and relatively inconsequential tasks, it is the practice in industry generally for the executive to perform them rather than to delegate them to other persons. When any one of these tasks is done frequently, however, it takes on the character of a regular production function which could be performed by a nonexempt employee and must be counted as nonexempt work. In determining whether such work is directly and closely related to the performance of the management duties, consideration should be given to whether it is (1) the same as the work performed by any of the subordinates of the executive; or (2) a specifically assigned task of the executive employees; or (3) practicably delegable to nonexempt employees in the establishment; or (4) repetitive and frequently recurring.

§ 541.111 Nonexempt work generally.

(a) As indicated in § 541.101 the term "nonexempt work," as used in this subpart, includes all work other than that described in § 541.1 (a) through (d) and the activities directly and closely related to such work.

(b) Nonexempt work is easily identifiable where, as in the usual case, it consists of work of the same nature as that performed by the nonexempt subordinates of the "executive." It is more difficult to identify in cases where supervisory employees spend a significant amount of time in activities not performed by any of their subordinates and not consisting of actual supervision and management. In such cases careful analysis of the employee's duties with reference to the phrase "directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section" will usually be necessary in arriving at a determination.

§ 541.112 Percentage limitations on nonexempt work.

(a) An employee will not qualify for exemption as an executive if he devotes more than 20 percent, or in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work. This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

(b) (1) The maximum allowance of 20 percent for nonexempt work applies unless the establishment by which the employeee is employed qualifies for the higher allowance as a retail or service establishment within the meaning of the act. Such an establishment must be a distinct physical place of business, open to the general public, which is engaged on the premises in making sales of goods or services to which the concept of retail selling or servicing applies. As defined in section 13(a)(2) of the act, such an establishment must make at least 75 percent of its annual dollar volume of sales of goods or services from sales that are both not for resale and recognized as retail in the particular industry. Types of establishments which may meet these tests include stores selling consumer goods to the public; hotels; motels; restaurants; some types of amusement or recreational establishments (but not those offering wagering or gambling facilities); hospitals, or institutions primarily engaged in the care of the sick, the aged, the mentally ill, or defective residing on the premises, if open to the general public; public parking lots and parking garages; auto repair shops; gasoline service stations (but not truck stops); funeral homes; cemeteries; etc. Further explanation and illustrations of the establishments included in the term "retail or service establishment" as used in the act may be found in Part 779 of this chapter.

(2) Public and private elementary and secondary schools and institutions

of higher education are, as a rule, not retail or service establishments, because they are not engaged in sales of goods or services to which the retail concept applies. Under section 13(a)(2)(iii) of the act prior to the 1966 amendments, it was possible for private schools for physically or mentally handicapped or gifted children to qualify as retail or service establishments if they met the statutory tests, because the special types of services provided to their students were considered by Congress to be of a kind that may be recognized as retail. Such schools, unless the nature of their operations has changed, may continue to qualify as retail or service establishments and, if they do, may utilize the greater tolerance for nonexempt work provided for executive and administrative employees of retail or service establishments under section 13(a)(1) of the act.

(3) The legislative history of the act makes it plain that an establishment engaged in laundering, cleaning, or repairing clothing or fabrics is not a retail or service establishment. When the act was amended in 1949, Congress excluded such establishments from the exemption under section 13(a)(2) because of the lack of a retail concept in the services sold by such establishments, and provided a separate exemption for them which did not depend on status as a retailer. Again in 1966, when this exemption was repealed, Congress made it plain by exclusionary language that the exemption for retail or service establishments was not to be applied to laundries or dry cleaners.

(c) There are two special exceptions to the percentage limitations of paragraph (a) of this section:

(1) That relating to the employee in "sole charge" of an independent or branch establishment, and

(2) That relating to an employee owning a 20-percent interest in the enterprise in which he is employed. These except the employee only from the percentage limitations on nonexempt work. They do not except the employee from any of the other requirements of § 541.1. Thus, while the percentage limitations on nonexempt work are not applicable, it is clear that an employee would not qualify for the exemption if he performs so much nonexempt work that he could no longer meet the requirement of § 541.1(a) that his primary duty must consist of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof.

§ 541.113 Sole-charge exception.

(a) An exception from the percentage limitations on nonexempt work is provided in § 541.1(e) for "an employee who is in sole charge of an independent establishment or a physically separated branch establishment * * *". Such an employee is considered to be employed in a bona fide executive capacity even though he exceeds the applicable percentage limitation on nonexempt work.

(b) The term "independent establishment" must be given full weight. The establishment must have a fixed location and must be geographically separated from other company property. The management of operations within one among several buildings located on a single or adjoining tracts of company property does not qualify for the exemption under this heading. In the case of a branch, there must be a true and complete physical separation from the main office.

(c)(1) A determination as to the status as "an independent establishment or a physically separated branch establishment" of any part of the business operations on the premises of a retail or other establishment, however, must be made on the basis of the physical and economic facts in the particular situation. (See 29 CFR 779.225, 779.305, 779.306.) A leased department cannot be considered to be a separate establishment where, for example, it and the retail store in which it is located operate under a common trade name and the store may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell its pricing policy, its hours of operation and some or all of its hiring, firing, and other personnel policies, and matters such as advertising, adjustment, and credit operations, insurance and taxes, are handled on a unified basis by the store.

(2) A leased department may qualify as a separate establishment, however, where, among other things, the facts show that the lessee maintains a separate entrance and operates under a separate name, with its own separate employees and records, and in other respects conducts his business independently of the lessor's. In such a case the leased department would enjoy the same status as a physically separated branch store.

(d) Since the employee must be in "sole charge, only one person in any establishment can qualify as an executive under this exception, and then only if he is the top person in charge at that location. (It is possible for other persons in the same establishment to qualify for exemption as executive employees, but not under the exception from the nonexempt work limitation.) Thus, it would not be applicable to an employee who is in charge of a branch establishment but whose superior makes his office on the premises. An example is a district manager who has overall supervisory functions in relation to a number of branch offices, but makes his office at one of the branches. The branch manager at the branch where the district manager's office is located is not in "sole charge" of the establishment and does not come within the exception. This does not mean that the "sole-charge" status of an employee will be considered lost because of an occasional visit to the branch office of the superior of the person in charge, or, in the case of an independent establishment by the visit for a short period on 1 or 2 days a week of the proprietor or principal corporate officer of the establishment. In these situations the sole-charge status of the employee in question will appear from the facts as to his functions, particularly in the intervals between visits. If, during these intervals, the decisions normally made by an executive in charge of a branch or an independent establishment are reserved for the superior, the employee is not in sole charge. If such decisions are not reserved for the superior, the sole-charge status will not be lost merely because of the superior's visits.

(e) In order to qualify for the exception the employee must ordinarily be in charge of all the company activities at the location where he is employed. If he is in charge of only a portion of the company's activities at his location, then he cannot be said to be in sole charge of an independent establishment or a physically separated branch establishment. In exceptional cases the divisions have found that an executive employee may be in sole charge of all activities at a branch office except that one independent function which is not integrated with those managed by the executive is also performed at the branch. This one function is not important to the activities managed by the executive and constitutes only an insignificant portion of the employer's activities at that branch. A typical example of this type of situation is one in which "desk space" in a warehouse otherwise devoted to the storage and shipment of parts is assigned a salesman who reports to the sales manager or other company official located at the home office. Normally only one employee (at most two or three, but in any event an insignificant number when compared with the total number of persons employed at the branch) is engaged in the nonintegrated function for which the executive whose sole-charge status is in question is not responsible. Under such circumstances the employee does not lose his "sole-charge" status merely because of the desk-space assignment.

§ 541.114 Exception for owners of 20-percent interest.

(a) An exception from the percentage limitations on nonexempt work is provided in § 541.1(e) for an employee "who owns at least a 20-percent interest in the enterprise in which he is employed". This provision recognizes the special status of a shareholder of an enterprise who is actively engaged in its management.

(b) The exception is available to an employee owning a bona fide 20-percent equity in the enterprise in which he is employed regardless of whether the business is a corporate or other type of organization.

§ 541.115 Working foremen.

(a) The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the "working" foreman or "working" supervisor who regularly performs "production" work or other work which is unrelated or only remotely related to his supervisory activities. (The term "working" foreman is used in this subpart in the sense indicated in the text and should not be construed to mean only one who performs work similar to that performed by his subordinates.)

(b) One type of working foreman or working supervisor most commonly found in industry works alongside his subordinates. Such employees, sometimes known as strawbosses, or gang or group leaders perform the same kind of work as that performed by their subordinates, and also carry on supervisory functions. Clearly, the work of the same nature as that performed by the employees' subordinates must be counted as nonexempt work and if the amount of such work performed is substantial the exemption does not apply. ("Substantial," as used in this section, means more than 20 percent. See discussion of the 20-percent limitation on nonexempt work in § 541.112.) A foreman in a dress shop, for example, who operates a sewing machine to produce the product is performing clearly nonexempt work. However, this should not be confused with the operation of a sewing machine by a foreman to instruct his subordinates in the making of a new product, such as a garment, before it goes into production.

(c) Another type of working foreman or working supervisor who cannot be classed as a bona fide executive is one who spends a substantial amount of time in work which, although not performed by his own subordinates, consists of ordinary production work or other routine, recurrent, repetitive tasks which are a regular part of his duties. Such an employee is in effect holding a dual job. He may be, for example, a combination foreman-production worker, supervisor-clerk, or foreman combined with some other skilled or unskilled occupation. His nonsupervisory duties in such instances are unrelated to anything he must do to supervise the employees under him or to manage the department. They are in many instances mere "fill-in" tasks performed because the job does not involve sufficient executive duties to occupy an employee's full time. In other instances the nonsupervisory, nonmanagerial duties may be the principal ones and the supervisory or managerial duties are subordinate and are assigned to the particular employee because it is more convenient to rest the responsibility for the first line of supervision in the hands of the person who performs these other duties. Typical of employees in dual jobs which may involve a substantial amount of nonexempt work are: (1) Foremen or supervisors who also perform one or more of the "production" or "operating" functions, though no other employees in the plant perform such work. An example of this kind of employee is the foreman in a millinery or garment plant who is also the cutter, or the foreman in a garment factory who operates a multiple-needle machine not requiring a full-time operator; (2) foremen or supervisors who have as a regular part of their duties the adjustment, repair, or maintenance of machinery or equipment. Examples in this category are the foreman-fixer in the hosiery industry who devotes a considerable amount of time to making adjustments and repairs to the machines of his subordinates, or the planer-mill foreman who is also the "machine man" who repairs the machines and grinds the knives; (3) foremen or supervisors who perform clerical work other than the maintenance of the time and production records of their subordinates; for example, the foreman of the shipping room who makes out the bills of lading and other shipping records, the warehouse foreman who also acts as inventory clerk, the head shipper who also has charge of a finished goods stock room, assisting in placing goods on shelves and keeping perpetual inventory records, or the office manager, head bookkeeper, or chief clerk who performs routine bookkeeping. There is no doubt that the head bookkeeper, for example, who spends a substantial amount of his time keeping books of the same general nature as those kept by the other bookkeepers, even though his books are confidential in nature or cover different transactions from the books maintained by the under bookkeepers, is not primarily an executive employee and should not be so considered.

§ 541.116 Trainees, executive.

The exemption is applicable to an employee employed in a bona fide executive capacity and does not include employees training to become executives and not actually performing the duties of an executive.

§ 541.117 Amount of salary required.

(a) Except as otherwise noted in paragraph (b) of this section, compensation on a salary basis at a rate of not less than $155 per week, exclusive of board, lodging, or other facilities, is required for exemption as an executive. The $155 a week may be translated into equivalent amounts for periods longer than 1 week. The requirement will be met if the employee is compensated biweekly on a salary basis of $310, semimonthly on a salary basis of $335.84 or monthly on a salary basis of $671.67. However, the shortest period of payment which will meet the requirement of payment "on a salary basis" is a week.

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an "executive" is $130 per week for other than an employee of the Federal Government.

(c) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in subpart A of this part do not prohibit the sale of such facilities to executives on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

(d) The validity of including a salary requirement in the regulations in subpart A of this part has been sustained in a number of appellate court decisions. See, for example, *Walling* v. *Yeakley*, 140 F. (2d) 830 (C.A. 10); *Helliwell* v. *Haberman*, 140 F. (2d) 833 (C.A. 2); and *Walling* v. *Morris*, 155 F. (2d) 832 (C.A. 6) (reversed on another point in 332 U.S. 442); *Wirtz* v. *Mississippi Publishers*, 364 F. (2d) 603 (C.A. 5); *Craig* v. *Far West Engineering Co.*, 265 F. (2d) 251 (C.A. 9) cert. den. 361 U.S. 816; *Hofer* v. *Federal Cartridge Corp.*, 71 F. Supp. 243 (D.C. Minn.).

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Postponed Regulations: Paragraphs (a) and (b) in § 541.117 were revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraphs (a) and (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.117 Amount of salary required.

(a) Except as otherwise noted in paragraph (b) of this section, compensation on a salary basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983, exclusive of board, lodging, or other facilities, is required for exemption as an executive. The $225 a week or $250 a week may be translated into equivalent amounts for periods longer than 1 week. For example, based on $250 a week, the requirement will be met if the employee is compensated biweekly on a salary basis of $500, semimonthly on a salary basis of $541.67 or monthly on a salary basis of $1083.33. However, the shortest period of payment which will meet the requirement of payment "on a salary basis" is a week.

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an "executive" is $180 per week beginning Febraruy 13, 1981 and $200 per week beginning February 13, 1983 for other than an employee of the Federal Goverment.

§ 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his *compensation*, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such days or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer, provided the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $200 in each week in which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7092, Feb. 19, 1975]

Postponed Regulations: Paragraph (b) in § 541.118 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraph (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.118 Salary basis.

* * * * *

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment "on a salary basis". For example, a salary of $300 in each week in which any work is performed, and an additional $55 which is made subject to deductions which are not permitted under paragraph (a) of this section.

§ 541.119 Special proviso for high salaried executives.

(a) Except as otherwise noted in paragraph (b) of this section, § 541.1 contains an upset or high salary proviso for managerial employees who are compensated on a salary basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities. Such a highly paid employee is deemed to meet all the requirements

BEST DOCUMENT AVAILABLE

in paragraphs (a) through (f) of § 541.1 if the employee's primary duty consists of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test that employee's qualifications in detail under paragraphs (a) through (f) of § 541.1 of this Part.

(b) In Puerto Rico, the Virgin Islands, and American Samoa the proviso of § 541.1(f) applies to those managerial employees (other than employees of the Federal Government) who are paid on a salary basis at a rate of not less than $200 per week.

(c) Mechanics, carpenters, linotype operators, or craftsmen of other kinds are not exempt under the proviso no matter how highly paid they might be.

[40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Section 541.119 was revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.119 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.119 Special proviso for high salaried executives.

(a) Except as otherwise noted in paragraph (b) of this section, § 541.1 contains an upset or high salary proviso for managerial employees who are compensated on a salary basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 exclusive of board, lodging, or other facilities. Such a highly paid employee is deemed to meet all the requirements in paragraphs (a) through (f) of § 541.1 if the employee's primary duty consists of the management of the enterprise in which employed or of a customarily recognized department or subdivision thereof and includes the customary and regular direction of the work of two or more other employees therein. If an employee qualifies for exemption under this proviso, it is not necessary to test that employee's qualifications in detail under paragraphs (a) through (f) of § 541.1 of this Part.

(b) In Puerto Rico, the Virgin Islands, and American Samoa the proviso of § 541.1(f) applies to those managerial employees (other than employees of the Federal Government) who are paid on a salary basis at a rate of not less than $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983.

(c) Mechanics, carpenters, linotype operators, or craftsmen of other kinds are not exempt under the proviso no matter how highly paid they might be.

EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY

§ 541.201 Types of administrative employees.

(a) Three types of employees are described in § 541.2(c) who, if they meet the other tests in § 541.2, qualify for exemption as "administrative" employees.

(1) *Executive and administrative assistants.* The first type is the assistant to a proprietor or to an executive or administrative employee. In modern industrial practice there has been a steady and increasing use of persons who assist an executive in the performance of his duties without themselves having executive authority. Typical titles of persons in this group are executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant and, in retail or service establishments, assistant manager and assistant buyer. Generally speaking, such assistants are found in large establishments where the official assisted has duties of such scope and which require so much attention that the work of personal scrutiny, correspondence, and interviews must be delegated.

(2) *Staff employees.* (i) Employees included in the second alternative in the definition are those who can be described as staff rather than line employees, or as functional rather than departmental heads. They include among others employees who act as advisory specialists to the management. Typical examples of such advisory specialists are tax experts, insurance experts, sales research experts, wage-rate analysts, investment consultants, foreign exchange consultants, and statisticians.

BEST DOCUMENT AVAILABLE

(ii) Also included are persons who are in charge of a so-called functional department, which may frequently be a one-man department. Typical examples of such employees are credit managers, purchasing agents, buyers, safety directors, personnel directors, and labor relations directors.

(3) *Those who perform special assignments.* (i) The third group consists of persons who perform special assignments. Among them are to be found a number of persons whose work is performed away from the employer's place of business. Typical titles of such persons are lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers for oil companies. It should be particularly noted that this is a field which is rife with honorific titles that do not adequately portray the nature of the employee's duties. The field representative of a utility company, for example, may be a "glorified serviceman."

(ii) This classification also includes employees whose special assignments are performed entirely or partly inside their employer's place of business. Examples are special organization planners, customers' brokers in stock exchange firms, so-called account executives in advertising firms and contact or promotion men of various types.

(b) *Job titles insufficient as yardsticks.* (1) The employees for whom exemption is sought under the term "administrative" have extremely diverse functions and a wide variety of titles. A title alone is of little or no assistance in determining the true importance of an employee to the employer or his exempt or nonexempt status under the regulations in subpart A of this part. Titles can be had cheaply and are of no determinative value. Thus, while there are supervisors of production control (whose decisions affect the welfare of large numbers of employees) who qualify for exemption under section 13(a)(1), it is not hard to call a rate setter (whose functions are limited to timing certain operations and jotting down times on a standardized form) a "methods engineer" or a "production-control supervisor."

(2) Many more examples could be cited to show that titles are insufficient as yardsticks. As has been indicated previously, the exempt or nonexempt status of any particular employee must be determined on the basis of whether his duties, responsibilities, and salary meet all the requirements of the appropriate section of the regulations in subpart A of this part.

(c) Individuals engaged in the overall academic administration of an elementary or secondary school system include the superintendent or other head of the system and those of his assistants whose duties are primarily concerned with administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program. In individual school establishments those engaged in overall academic administration include the principal and the vice principals who are responsible for the operation of the school. Other employees engaged in academic administration are such department heads as the heads of the mathematics department, the English department, the foreign language department, the manual crafts department, and the like. Institutions of higher education have similar organizational structure, although in many cases somewhat more complex.

§ 541.202 Categories of work.

(a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition: (This classification is without regard to whether the work is manual or nonmanual. The problem of manual work as it affects the exemption of administrative employees is discussed in § 541.203.) (1) The work specifically described in paragraphs (a), (b), and (c) of § 541.2; (2) routine work which is directly and closely related to the performance of the work which is described in paragraphs (a), (b), and (c) of § 541.2; and (3) routine work which is not related or is only remotely related to the administrative duties. (As used in this subpart the phrase "routine work" means work which does not require the exercise of discretion and independent judgment. It is not necessarily restricted to work which is repetitive in nature.)

(b) The work in category 1, that which is specifically described in § 541.2 as requiring the exercise of discretion and independent judgment, is clearly exempt in nature.

(c) Category 2 consists of work which if separated from the work in category 1 would appear to be routine, or on a fairly low level, and which does not itself require the exercise of discretion and independent judgment, but which has a direct and close relationship to the performance of the more important duties. The directness and closeness of the relationship may vary depending upon the nature of the job and the size and organization of the establishment in which the work is performed. This "directly and closely related" work includes routine work which necessarily arises out of the administrative duties, and the routine work without which the employee's more important work cannot be performed properly. It also includes a variety of routine tasks which may not be essential to the proper performance of the more important duties but which are functionally related to them directly and closely. In this latter category are activities which an administrative employee may reasonably be expected to perform in connection with carrying out his administrative functions including duties which either facilitate or arise incidentally from the performance of such functions and are commonly performed in connection with them.

(d) These "directly and closely related" duties are distinguishable from the last group, category 3, those which are remotely related or completely unrelated to the more important tasks. The work in this last category is nonexempt and must not exceed the 20-percent limitation for nonexempt work (up to 40 percent or service establishment) if the exemption is to apply.

(e) Work performed by employees in the capacity of "academic administrative" personnel is a category of administrative work limited to a class of employees engaged in academic administration as contrasted with the general usable of "administrative" in the act. The term "academic administrative" denotes administration relating to the academic operations and functions in a school rather than to administration along the lines of general business operations. Academic administrative personnel are performing operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration. Examples of jobs in school systems, and educational establishments and institutions, which are outside the term academic administration are jobs relating to building management and maintenance, jobs relating to the health of the students and academic staff such as social workers, psychologist, lunch room manager, or dietitian. Employees in such work which is not considered academic administration may qualify for exemption under other provisions of § 541.2 or under other sections of the regulations in subpart A of this part provided the requirements for such exemptions are met.

§ 541.203 Nonmanual work.

(a) The requirement that the work performed by an exempt administrative employee must be office work or nonmanual work restricts the exemption to "white-collar" employees who meet the tests. If the work performed is "office" work it is immaterial whether it is manual or nonmanual in nature. This is consistent with the intent to include within the term "administrative" only employees who are basically white-collar employees since the accepted usage of the term "white-collar" includes all office workers. Persons employed in the routine operation of office machines are engaged in office work within the meaning of § 541.2 (although they would not qualify as administrative employees since they do not meet the other requirements of § 541.2).

(b) Section 541.2 does not completely prohibit the performance of manual work by an "administrative" employee. The performance by an otherwise exempt administrative employee of some manual work which is directly and closely related to the work requiring the exercise of discretion and independent judgment is not inconsistent with the principle that the exemption is limited to "white-collar" employees. However, if the employee performs so much manual work (other than office work) that he cannot be said to be basically a "white-collar" employee he does not qualify for exemption as a bona fide administrative employee, even if the manual work he performs is directly and closely related to the work requiring the exercise of discretion and independent judgment. Thus, it is obvious that employees who spend most of their time in using tools, instruments, machinery, or other equipment, or in performing repetitive operations with their hands, no matter how much skill is required, would not be bona fide administrative employees within the meaning of § 541.2. An office employee, on the other hand, is a "white-collar" worker, and would not lose the exemption on the grounds that he is not primarily engaged in "nonmanual" work, although he would lose the exemption if he failed to meet any of the other requirements.

§ 541.205 Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those work affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations. On the other hand, the bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mine positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(2) An employee performing routine clerical duties obviously is not per-

forming work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in § 541.2.

(3) Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(4) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(5) The test of "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

(6) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(7) In the data processing field some firms employ persons described as systems analysts and computer programers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under § 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

§ 541.206 Primary duty.

(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or, in the case of "academic administrative personnel," the employee must have as his primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.

(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in § 541.103 in the discussion of "primary duty" under the definition of "executive" are applicable.

§ 541.207 Discretion and independent judgment.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in Subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. (Without actually attempting to define the term, the courts have given it this meaning in applying it in particular cases. See, for example, *Walling* v. *Sterling Ice Co.*, 69 F. Supp. 655, reversed on other grounds, 165 F. (2d) 265 (CCA 10). See also *Connell* v. *Delaware Aircraft Industries*, 55 Atl. (2d) 637.)

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decisions relating to matters of little consequence.

(c) Distinguished from skills and procedures:

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example, to accept or reject an

insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart from the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(3) A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently cataloged. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations in subpart A of this part. The mere fact that the employee uses his knowledge and experience does not change his decision, i.e., that the product does or does not conform with the established standard, into a real decision in a significant matter.

(4) For example, certain "graders" of lumber turn over each "stick" to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee's familiarity with them stems from his experience and training. Skill rather than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judgment as contemplated by the regulations in Subpart A of this part. In addition, in those situations in which an otherwise exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

(5) Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the "screening" of applicants by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The "screening" operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations in Subpart A of this part. On the other hand an exempt personnel manager will often perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(6) Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitor's store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however, by the buyer who evaluates the assistants' reports and on the basis of their findings directs that certain items be re-priced. When performed by the buyer who actually makes the decisions which affect the buying or pricing policies of the department he manages, the com-

parison shopping, although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

(7) In the data processing field a systems analyst is exercising discretion and independent judgment when he develops methods to process, for example, accounting, inventory, sales, and other business information by using electronic computers. He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programer he is exercising discretion and independent judgment. A computer programer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is clear that the duties of data processing employees such as tape librarians, keypunch operators, computer operators, junior programers and programer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

(d) Decisions in significant matters:

(1) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truckdriver to decide which route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than another. Yet it is obvious that these decisions do not constitute the exercise of discretion and independent judgment of the level contemplated by the regulations in Subpart A of this part. The divisions have consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations in Subpart A of this part, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by courts in decisions involving the application of the regulations in this part, to particular cases.

(2) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations in Subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in Subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in Subpart A

of this part also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handles callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of descretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.

(e) Final decisions not necessary:

(1) The term "discretion and independent judgment" as used in the regulations in Subpart A of this part does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations in Subpart A of this part. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president may alter or discard the prepared reply and direct that another be sent instead. This section by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

(2) The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say 6 months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level.

(f) Distinguished from loss through neglect: A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures, the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller's window and in related routine bookkeeping duties may, by crediting the wrong account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading oil onto a ship may, by not applying correct techniques fail to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the exercise of discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(g) Customarily and regularly: The work of an exempt administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

§ 541.208 Directly and closely related.

(a) As indicated in § 541.202, work which is directly and closely related to the performance of the work described in § 541.2 is considered exempt work. Some illustrations may be helpful in clarifying the differences between such work and work which is unrelated or only remotely related to the work described in § 541.2.

(b) (1) For purposes of illustration, the case of a high-salaried management consultant about whose exempt status as an administrative employee there is no doubt will be assumed. The particular employee is employed by a firm of consultants and performs work in which he customarily and regularly exercises discretion and independent judgment. The work consists primarily of analyzing, and recommending changes in, the business operations of his employer's client. This work falls in the category of exempt work described in § 541.2.

(2) In the course of performing that work, the consultant makes extensive notes recording the flow of work and materials through the office and plant of the client. Standing alone or separated from the primary duty such notemaking would be routine in nature. However, this is work without which the more important work cannot be performed properly. It is "directly and closely related" to the administrative work and is therefore exempt work. Upon his return to the office of his employer the consultant personally types his report and draws, first in rough and then in final form, a proposed table of organization to be submitted with it. Although all this work may not be essential to the performance of his more important work, it is all directly and closely related to that work and should be considered exempt. While it is possible to assign the typing and final drafting to nonexempt employees and in fact it is frequently the practice to do so, it is not required as a condition of exemption that it be so delegated.

(3) Finally, if because this particular employee has a special skill in such work, he also drafts tables or organization proposed by other consultants, he would then be performing routine work wholly unrelated, or at best only remotely related, to his more important work. Under such conditions, the drafting is nonexempt.

(c) Another illustration is the credit manager who makes and administers the credit policy of his employer. Establishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of particular customers, would be exempt work of the kind specifically described in § 541.2. Work which is directly and closely related to these exempt duties may include such activities as checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis and writing letters giving credit data and experience to other employers or credit agencies. On the other hand, any general office or bookkeeping work is nonexempt work. For instance, posting to the accounts receivable ledger would be only remotely related to his administrative work and must be considered nonexempt.

(d) One phase of the work of an administrative assistant to a bona fide executive or administrative employee provides another illustration. The work of determining whether to answer correspondence personally, call it to his superior's attention, or route it to someone else for reply requires the exercise of discretion and independent judgment and is exempt work of the kind described in § 541.2. Opening the mail for the purpose of reading it to make the decisions indicated will be directly and closely related to the administrative work described. However, merely opening mail and placing it unread before his superior or some other person would be related only remotely, if at all, to any work requiring the exercise of discretion and independent judgment.

(e) The following additional examples may also be of value in applying these principles. A traffic manager is employed to handle the company's transportation problems. The exempt work performed by such an employee would include planning the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise in transit and making the necessary rearrangements resulting from delays, damages, or irregularities in transit. This employee may also spend part of his time taking city orders (for local deliveries) over the telephone. The order-taking is a routine function not directly and closely related to the exempt work and must be considered nonexempt.

(f) An office manager who does not supervise two or more employees would not meet the requirements for exemption as an executive employee but may possibly qualify for exemption as an administrative employee. Such an employee may perform administrative duties, such as the executive of the employer's credit policy, the management of the company's traffic, purchasing, and other responsible office work requiring the customary and regular exercise of discretion and judgment, which are clearly exempt. On the other hand, this office manager may perform all the bookkeeping, prepare the confidential or regular payrolls, and send out monthly statements of account. These latter activities are not directly and closely related to the exempt functions and are not exempt.

§ 541.209 Percentage limitations on nonexempt work.

(a) Under § 541.2(d), an employee will not qualify for exemption as an administrative employee if he devotes more than 20 percent, or, in the case of an employee of a retail or service establishment if he devotes as much as 40 percent, of his hours worked in the workweek to nonexempt work; that is, to activities which are not directly and closely related to the performance of the work described in § 541.2 (a) through (c).

(b) This test is applied on a workweek basis and the percentage of time spent on nonexempt work is computed on the time worked by the employee.

(c) The tolerance for nonexempt work allows the performance of nonexempt manual or nonmanual work within the percentages allowed for all types of nonexempt work.

(d) Refer to § 541.112(b) for the definition of a retail or service establishment as this term is used in paragraph (a) of this section.

§ 541.210 Trainees, administrative.

The exemption is applicable to an employee employed in a bona fide administrative capacity and does not include emloyees training for employment in an administrative capacity who are not actually performing the duties of an administrative employee.

§ 541.211 Amount of salary or fees required.

(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than $155 a week, exclusive of board, lodging or other facilities, is required for exemption as an administrative employee. The requirement will be met if the employee is compensated biweekly on a salary basis of $310, semimonthly on a salary basis of $335.84, or monthly on a salary basis of $671.67.

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an administrative employee is $125 per week for other than an employee of the Federal Government.

(c) In the case of academic administrative personnel, the compensation requirement for exemption as an administrative employee may be met either by the payment described in paragraph (a) or (b) of this section, whichever is applicable, or alternatively by compensation on a salary basis in an amount which is at least equal to the entrance salary for teachers in the school system, or educational establishment or institution by which the employee is employed.

(d) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in Subpart A of this part do not prohibit the sale of such facilities to administrative employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Paragraphs (a) and (b) in § 541.211 were revised at 46 FR 3014, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraphs (a) and (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.211 Amount of salary or fees required.

(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983, exclusive of board, lodging or other facilities, is required for exemption as an administrative employee. For example, based on $250 a week, the requirement will be met if the employee is compensated biweekly on a salary basis of $500, semimonthly on a salary basis of $541.67 or monthly on a salary basis of $1,083.33.

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the salary test for exemption as an administrative employee is $180 per week beginning February 13, 1981 and $200 per week beginning February 13, 1983 for other than an employee of the Federal Government.

§ 541.212 Salary basis.

The explanation of the salary basis of payment made in § 541.118 in connection with the definition of "executive" is also applicable in the definition of "administrative".

§ 541.213 Fee basis.

The requirements for exemption as an administrative employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis. For a discussion of payment of a fee basis, see § 541.313.

§ 541.214 Special proviso for high salaried administrative employees.

(a) Except as otherwise noted in paragraph (b) of this section, § 541.2 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein, where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in § 541.2 (a) through (e). If an employee qualifies for exemption under this provisio, it is not necessary to test the employee's qualifications in detail under § 541.2 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the proviso of § 541.2(e) applies to those administrative employees other than an employee of the Federal Government who are compensated on a salary or fee basis or not less than $200 per week.

[40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Section 541.214 was revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

BEST DOCUMENT AVAILABLE

The text of § 541.214 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.214 Special proviso for high salaried administrative employees.

(a) Except as otherwise noted in paragraph (b) of this section, § 541.2 contains a special proviso including within the definition of "administrative" an employee who is compensated on a salary or fee basis at a rate of not less than $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983, exclusive of board, lodging, or other facilities, and whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, or the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein, where the performance of such primary duty includes work requiring the exercise of discretion and independent judgment. Such a highly paid employee having such work as his or her primary duty is deemed to meet all the requirements in § 541.2 (a) through (e). If an employee qualifies for exemption under this provisio, it is not necessary to test the employee's qualifications in detail under § 541.2 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa, the proviso of § 541.2(c) applies to those administrative employees other than an employee of the Federal Government who are compensated on a salary or fee basis or not less than $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983.

§ 541.215 Elementary or secondary schools and other educational establishments and institutions.

To be considered for exemption as employed in the capacity of academic administrative personnel, the employment must be in connection with the operation of an elementary or secondary school system, an institution of higher education, or other educational establishment or institution. Sections 3(v) and 3(w) of the act define elementary and secondary schools as those day or residential schools which provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may include also nursery school programs in elementary education and junior college curriculums in secondary education. Education above the secondary school level is in any event included in the programs of institutions of higher education. Special schools for mentally or physically handicapped or gifted children are included among the educational establishments in which teachers and academic administrative personnel may qualify for the administrative exemption, regardless of any classification of such schools as elementary, secondary, or higher. Also, for purposes of the exemption, no distinction is drawn between public or private schools. Accordingly, the classification for other purposes of the school system, or educational establishment or institution, is ordinarily not a matter requiring consideration in a determination of whether the exemption applies. If the work is that of a teacher or academic personnel as defined in the regulations, in such an educational system, establishment, or institution, and if the other requirement of the regulations, are met, the level of instruction involved and the status of the school as public or private or operated for profit or not for profit will not alter the availability of the exemption.

EMPLOYEE EMPLOYED IN A BONA FIDE PROFESSIONAL CAPACITY

§ 541.301 General.

The term "professional" is not restricted to the traditional professions of law, medicine, and theology. It includes those professions which have a recognized status and which are based on the acquirement of professional knowledge through prolonged study. It also includes the artistic professions, such as acting or music. Since the test of the bona fide professional capacity of such employment is different in character from the test for persons in the learned professions, an alternative test for such employees is contained in the regulations, in addition to the requirements common to both groups.

BEST DOCUMENT AVAILABLE

§ 541.302 Learned professions.

(a) The "learned" professions are described in § 541.3(a)(1) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level.

(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption. The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions may qualify for exemption under other sections of the regulations in Subpart A of this part or under the alternative paragraph of the "professional" definition applicable to the artistic fields.

(e) (1) Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prequisite. In the case of registered (or certified) medical technologists, successful completion of 3 academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of § 541.3(a)(1) of the regulations.

(2) The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes closer to meeting the tests. However, just as an excellent legal stenographer is not a lawyer, these technical specialists must be more than highly skilled technicians. Many employees in indus-

try rise to executive or administrative positions by their natural ability and good commonsense, combined with long experience with a company, without the aid of a college education or degree in any area. A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive job would depend upon the person's own inherent talent. The professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study.

(f) Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises). (Some accountants may qualify for exemption as bona fide administrative employees.) However, exemption of accountants, as in the case of other occupational groups (see § 541.308), must be determined on the basis of the individual employee's duties and the other criteria in the regulations. It has been the Divisions' experience that certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption since they meet the tests contained in § 541.3. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of "professional" employee. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

(g) (1) A requisite for exemption as a teacher is the condition that the employee is "employed and engaged" in this activity as a teacher in the school system, or educational establishment or institution by which he is employed.

(2) "Employed and engaged as a teacher" denotes employment and engagement in the named specific occupational category as a requisite for exemption. Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers' teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

(3) Within the public schools of all the States, certificates, whether conditional or unconditional, have become a uniform requirement for employment as a teacher at the elementary and secondary levels. The possession of an elementary or secondary teacher's certificate provide a uniform means of identifying the individuals contemplated as being within the scope of the exemption provided by the statutory language and defined in § 541.3(a)(3) with respect to all teachers employed in public schools and those private schools who possess State certificates. However, the private schools of all the States are not uniform in requiring a certificate for employment as an elementary or secondary school teacher and teacher's certificates are not generally necessary for employment as a teacher in institutions of higher education or other educational establishments which rely on other qualifica-

tion standards. Therefore, a teacher who is not certified but is engaged in teaching in such a school may be considered for exemption provided that such teacher is employed as a teacher by the employing school or school system and satisfies the other requirements of § 541.3.

(4) Whether certification is conditional or unconditional will not affect the determination as to employment within the scope of the exemption contemplated by this section. There is no standard terminology within the States referring to the different kinds of certificates. The meanings of such labels as permanent, standard, provisional, temporary, emergency, professional, highest standard, limited, and unlimited vary widely. For the purpose of this section, the terminology affixed by the particular State in designating the certificates does not affect the determination of the exempt status of the individual.

(h) The question arises whether computer programers and systems analysts in the data processing field are included in the learned professions. At the present time there is too great a variation in standards and academic requirements to conclude that employees employed in such occupations are a part of a true profession recognized as such by the academic community with universally accepted standards for employment in the field. Some computer programers and systems analysts may have managerial and administrative duties which may qualify them for exemption under §§ 541.1 or 541.2 (see §§ 541.205(c)(7) and 541.207(c)(7) of this subpart).

§ 541.303 Artistic professions.

(a) The requirements concerning the character of the artistic type of professional work are contained in § 541.3(a)(2). Work of this type is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee.

(b) The work must be "in a recognized field of artistic endeavor." This includes such fields as music, writing, the theater, and the plastic and graphic arts.

(c) (1) The work must be original and creative in character, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training. In the field of music there should be little difficulty in ascertaining the application of the requirement. Musicians, composers, conductors, soloists, all are engaged in original and creative work within the sense of this definition. In the plastic and graphic arts the requirement is, generally speaking, met by painters who at most are given the subject matter of their painting. It is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. It would not normally be met by a peron who is employed as a copyist, or as an "animator" of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

(2) In the field of writing the distinction is perhaps more difficult to draw. Obviously the requirement is met by essayists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed). The requirement would also be met, generally speaking, by persons holding the more responsible writing positions in advertising agencies.

(d) Another requirement is that the employee be engaged in work "the result of which depends primarily on the invention, imagination, or talent of the employee." This requirement is easily met by a person employed as an actor, or a singer, or a violinist, or a short-story writer. In the case of newspaper employees the distinction here is similar to the distinction observed above in connection with the requirement that the work be "original and creative in character." Obviously the majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on "invention, imaging, or talent." On the other hand, this requirement will normally be met by actors, musicians, painters, and other artists.

(e) (1) The determination of the exempt or nonexempt status of radio and television announcers as professional employees has been relatively difficult because of the merging of the artistic aspects of the job with the commercial. There is considerable variation in the type of work performed by various announcers, ranging from predominantly routine to predominantly exempt work. The wide variation in earnings as between individual announcers, from the highly paid "name" announcer on a national network who is greatly in demand by sponsors to the staff announcer paid a comparatively small salary in a small station, indicates not only great differences in personality, voice and manner, but also in some inherent special ability or talent which, while extremely difficult to define, is nevertheless real.

(2) The duties which many announcers are called upon to perform include: Functioning as a master of ceremonies; playing dramatic, comedy, or straight parts in a program; interviewing; conducting farm, fashion, and home economics programs; covering public events, such as sports programs, in which the announcer may be required to ad lib and describe current changing events; and acting as narrator and commentator. Such work is generally exempt. Work such as giving station identification and time signals, announcing the names of programs, and similar routine work is nonexempt work. In the field of radio entertainment as in other fields of artistic endeavor, the status of an employee as a bona fide professional under § 541.3 is in large part dependent upon whether his duties are original and creative in character, and whether they require invention, imagination or talent. The determination of whether a particular announcer is exempt as a professional employee must be based upon his individual duties and the amount of exempt and nonexempt work performed, as well as his compensation.

(f) The field of journalism also employs many exempt as well as many nonexempt employees under the same or similiar job titles. Newspaper writers and reporters are the principal categories of employment in which this is found.

(1) Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements of § 541.3(a)(1) for exemption as professional employees of the "learned" type. Exemption for newspaper writers as professional employees is normally available only under the provisions for professional employees of the "artistic" type. Newspaper writing of the exempt type must, therefore, be "predominantly original and creative in character." Only writing which is analytical, interpretative or highly individualized is considered to be creative in nature. (The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work.) Newspaper writers commonly performing work which is original and creative within the meaning of § 541.3 are editorial writers, columnists, critics, and "top-flight" writers of analytical and interpretative articles.

(2) The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character within the meaning of § 541.3 and must be considered as nonexempt work. Thus, a reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite man or other editorial employees for story preparation. Such work is nonexempt work. The leg man, the reporter covering a police beat, the reporter sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature within the meaning of the act and § 541.3.

(3) Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional

work, however, need not be counted as nonexempt work. Thus, if a dramatic critic interviews an actor and writes a story around the interview, the work of interviewing him and writing the story would not be considered as nonexempt work. However, a dramatic critic who is assigned to cover a routine news event such as a fire or a convention would be doing nonexempt work since covering the fire or the convention would not be necessary and incident to his work as a dramatic critic.

§ 541.304 Primary duty.

(a) For a general explanation of the term "primary duty" see the discussion of this term under "executive" in § 541.103. See also the discussion under "administrative" in § 541.206.

(b) The "primary duty" of an employee as a teacher must be that of activity in the field of teaching. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption within the scope of § 541.3(a)(3) if the individual is not in fact both employed and engaged as a teacher (see § 541.302(g)(2)). The words "primary duty" have the effect of placing major emphasis on the character of the employee's job as a whole. Therefore, employment and engagement in the activity of imparting knowledge as a primary duty shall be determinative with respect to employment within the meaning of the exemption as "teacher" in conjunction with the other requirements of § 541.3.

§ 541.305 Discretion and judgment.

(a) Under § 541.3 a professional employee must perform work which requires the consistent exercise of discretion and judgment in its performance.

(b) A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

§ 541.306 Predominantly intellectual and varied.

(a) Section 541.3 requires that the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. This test applies to the type of thinking which must be performed by the employee in question. While a doctor may make 20 physical examinations in the morning and perform in the course of his examinations essentially similar tests. It requires not only judgment and discretion on his part but a continual variety of interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to be made therefrom. The work of the true professional is inherently varied even though similar outward actions may be performed.

(b) Another example of this is the professional medical technologist who performs complicated chemical, microscopic, and bacteriological tests and procedures. In a large medical laboratory or clinic, the technologist usually specializes in making several kinds of related tests in areas such as microbiology, parasitology, biochemistry, hematology, histology, cytology, and nuclear medical technology. The technologist also does the blood banking. He will also conduct tests related to the examination and treatment of patients, or do research on new drugs, or on the improvement of laboratory techniques, or teach and perform administrative duties. The simple, routine, and preliminary tests are generally performed by laboratory assistants or technicians. However, technologists who work in small laboratories may perform tasks that are performed by nonexempt employees in larger establishments. This type of activity will not necessarily be considered nonexempt (see § 541.307).

(c) On the other hand, X-ray technicians have only limited opportunity for the exercise of independent discretion and judgment, usually performing their duties under the supervision of a more highly qualified employee. The more complex duties of interpretation and judgment in this field are performed by obviously exempt professional employees.

§ 541.307 Essential part of and necessarily incident to.

(a) Section 541.3(d), it will be noted, has the effect of including within the exempt work activities which are an essential part of and necessarily incident to the professional work described in § 541.3 (a) through (c). This provision recognizes the fact that there are professional employees whose work necessarily involves some of the actual routine physical tasks also performed by obviously nonexempt employees. For example, a chemist performing important and original experiments frequently finds it necessary to perform himself some of the most mental tasks in connection with the operation of his experiments, even though at times these menial tasks can be conveniently or properly assigned to laboratory assistants. See also the example of incidental interviewing or investigation in § 541.303(a)(3).

(b) It should be noted that the test of whether routine work is exempt work is different in the definition of "professional" from that in the definition of "executive" and "administrative." Thus, while routine work will be exempt if it is "directly and closely related" to the performance of executive or administrative duties, work which is directly and closely related to the performance of the professional duties will not be exempt unless it is also "an essential part of and necessarily incident to" the professional work.

(c) Section 541.3(d) takes into consideration the fact that there are teaching employees whose work necessarily involves some of the actual routine duties and physical tasks also performed by nonexempt employees. For example, a teacher may conduct his pupils on a field trip related to the classroom work of his pupils and in connection with the field trip engage in activities such as driving a school bus and monitoring the behavior of his pupils in public restraurants. These duties are an essential part of and necessarily incident to his job as teacher. However, driving a school bus each day at the beginning and end of the schools day to pick up and deliver pupils would not be exempt type work.

§ 541.308 Nonexempt work generally.

(a) It has been the Divisions' experience that some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, the exemption of individual depends upon his duties and other qualifications.

(b) It is necessary to emphasize the fact that section 13(a)(1) exempts "any employee employed in a bona fide * * * professional capacity." It does not exempt all employees of professional employers, or all employees in industries having large numbers of professional members, or all employees in any particular occupation. Nor does it exempt, as such those learning a profession. Moreover, it does not exempt persons with professional training, who are working in professional fields, but performing subprofessional or routine work. For example, in the field of library science there are large numbers of employees who are trained librarians but who, nevertheless, do not perform professional work or receive salaries commensurate with recognized professional status. The field of "engineering" has many persons with "engineer" titles, who are not professional engineers, as well as many who are trained in the engineering profession, but are actually working as trainees, junior engineers, or draftsmen.

§ 541.309 20-percent nonexempt work limitation.

Time spent in nonexempt work, that is, work which is not an essential part of and necessarily incident to the exempt work, is limited to 20 percent of the time worked by the employee in the workweek.

§ 541.310 Trainees, professional.

The exemption applies to an employee employed in a bona fide professional capacity and does not include trainees who are not actually performing the duties of a professional employee.

§ 541.311 Amount of salary or fees required.

(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than $170 per week, exclusive of board, lodging or other facilities, is required for exemption as a "professional employee." An employee will meet this requirement if paid a biweekly salary of $340, a semi monthly salary of $368.33 or a monthly salary of $736.67.

(b) In Puerto Rico, the Virgin Islands, and American Samoa the salary test for exemption as a "professional" for other than employees of the Federal Government is $150 per week.

(c) The payment of the compensation specified in paragraph (a) or (b) of this section is not a requisite for exemption in the case of employees exempted from this requirement by the proviso to § 541.3(e), as explained in § 541.314.

(d) The payment of the required salary must be exclusive of board, lodging, or other facilities; that is, free and clear. On the other hand, the regulations in Subpart A of this part do not prohibit the sale of such facilities to professional employees on a cash basis if they are negotiated in the same manner as similar transactions with other persons.

[38 FR 11390, May 7, 1973, as amended at 40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Paragraphs (a) and (b) in § 541.311 were revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraphs (a) and (b) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.311 Amount of salary or fees required.

(a) Except as otherwise noted in paragraphs (b) and (c) of this section, compensation on a salary or fee basis at a rate of not less than $250 per week beginning February 13, 1981 and $280 per week beginning February 13, 1983, exclusive of board, lodging or other facilities, is required for exemption as a "professional employee." For example, based on $280 a week, an employee will meet this requirement if paid a biweekly salary of $560, a semi-monthly salary of $606.67 or a monthly salary of $1,213.33.

(b) In Puerto Rico, the Virgin Islands, and American Samoa the salary test for exemption as a "professional" for other than employees of the Federal Government is $225 per week beginning February 13, 1981 and $250 per week beginning February 13, 1983.

§ 541.312 Salary basis.

The salary basis of payment is explained in § 541.118 in connection with the definition of "executive."

§ 541.313 Fee basis.

(a) The requirements for exemption as a professional (or administrative) employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis.

(b) Little or no difficulty arises in determining whether a particular employment arrangement involves payment on a fee basis. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. The type of payment contemplated in the regulations in Subpart A of this part is thus readily recognized.

(c) The adequacy of a fee payment. Whether it amounts of payment at a rate of not less than $170 per week to a professional employee or at a rate of not less than $155 per week to an administrative employee can ordinarily be determined only after the time worked on the job has been determined. In determining whether payment is at the rate specified in the regulations in Subpart A of this part the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee

BEST DOCUMENT AVAILABLE

payment by determining whether the payment is at a rate which would amount to at least $170 per week to a professional employee or at a rate of not less than $155 per week to an administrative employee if 40 hours were worked.

(d) The following examples will illustrate the principle stated above:

(1) A singer receives $50 for a song on a 15-minute program (no rehearsal time is involved). Obviously the requirement will be met since the employee would earn $170 at this rate of pay in far less than 40 hours.

(2) An artist is paid $100 for a picture. Upon completion of the assignment, it is determined that the artist worked 20 hours. Since earnings at this rate would yield the artist $200 if 40 hours were worked, the requirement is met.

(3) An illustrator is assigned the illustration of a pamphlet at a fee of $150. When the job is completed, it is determined that the employee worked 60 hours. If the employee worked 40 hours at this rate, the employee would have earned only $100. The fee payment of $150 for work which required 60 hours to complete therefore does not meet the requirement of payment at a rate of $170 per week and the employee must be considered nonexempt. It follows that if in the performance of this assignment the illustrator worked in excess of 40 hours in any week, overtime rates must be paid. Whether or not the employee worked in excess of 40 hours in any week, records for such an employee would have to be kept in accordance with the regulations covering records for nonexempt employees (Part 516 of this chapter).

[38 FR 11390, May 7, 1973, as amended at 40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Paragraphs (c) and (d) in § 541.313 were revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of paragraphs (c) and (d) set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.313 Fee basis.

* * * * *

(c) Examples of the adequacy of certain fee payments follow. For example, whether a fee payment amounts to payment at a rate of not less than $280 per week to a professional employee or at a rate of not less than $250 per week to an administrative employee can ordinarily be determined only after the time worked on the job has been determined. In determining whether payment is at the rate specified in the regulations in Subpart A of this part the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Thus compliance will be tested in each case of a fee payment by determining whether the payment is at a rate which would amount to at least $280 per week to a professional employee or at a rate of not less then $250 per week to an administrative employee if 40 hours were worked.

(d) The following examples will illustrate the principle stated above:

(1) A singer receives $50 for a song on a 15-minute program (no rehearsal time is involved). Obviously the requirement will be met since the employee would earn $280 at this rate of pay in far less than 40 hours.

(2) An artist is paid $150 for a picture. Upon completion of the assignment, it is determined that the artist worked 20 hours. Since earnings at this rate would yield the artist $300 if 40 hours were worked, the requirement is met.

(3) An isslustrator is assigned the illustration of a pamphlet at a fee of $180. When the job is completed, it is determined that the employee worked 60 hours. If the employee worked 40 hours at this rate, the employee would have earned only $120. The fee payment of $180 for work which required 60 hours to complete therefore does not meet the requirement of payment at a rate of $280 per week and the employee must be considered nonexempt. If follows that if in the performance of this assignment the illustrator worked in excess of 40 hours in any week, overtime rates must be paid. Whether or not the employee worked in excess of 40 hours in any week, records for such an employee would have to be kept in accordance with the regulations covering records for nonexempt employees (Part 516 of this chapter).

§ 541.314 Exception for physicians, lawyers, and teachers.

(a) A holder of a valid license or certificate permitting the practice of law or medicine or any of their branches, who is actually engaged in practicing the profession, or a holder of the req-

BEST DOCUMENT AVAILABLE

uisite academic degree for the general practice of medicine who is engaged in an internship or resident program pursuant to the practice of his profession, or an employee employed and engaged as a teacher in the activity of imparting knowledge, is excepted from the salary or fee requirement. This exception applies only to the traditional professions of law, medicine, and teaching and not to employees in related professions which merely serve these professions.

(b) In the case of medicine:

(1) The exception applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialities practiced by physicians or practitioners. The term physicians means medical doctors including general practitioners and specialists, and osteopathic physicians (doctors of osteopathy). Other practitioners in the field of medical science and healing may include podiatrists (sometimes called chiropodists), dentists (doctors of dental medicine), optometrists (doctors of optometry or bachelors of science in optometry).

(2) Physicians and other practitioners included in paragraph (b)(1) of this section, whether or not licensed to practice prior to commencement of an internship or resident program, are excepted from the salary or fee requirement during their internship or resident program, where such a training program is entered upon after the earning of the appropriate degree required for the general practice of their profession.

(c) In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

§ 541.315 Special proviso for high salaried professional employees.

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal government) who are compensated on a salary or fee basis of not less than $200 per week.

[40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Section 541.315 was revised at 46 FR 3015, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.315 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.315 Special proviso for high salaried professional employees.

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983, exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal Government) who are compensated on a salary or fee basis of not less than $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983.

EMPLOYEE EMPLOYED IN THE CAPACITY OF OUTSIDE SALESMAN

§ 541.500 Definition of "outside salesman."

Section 541.5 defines the term "outside salesman" as follows: The term "employee employed * * * in the capacity of outside salesman" in section 13(a)(1) of the act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of the act; or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a) (1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employers: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

§ 541.501 Making sales or obtaining orders.

(a) Section 541.5 requires that the employee be engaged in: (1) Making sales within the meaning of section 3(k) of the act, or (2) obtaining orders or contracts for services or for the use of facilities.

(b) Generally speaking, the divisions have interpreted section 3(k) of the act to include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Thus sales of automobiles, coffee, shoes, cigars, stocks, bonds, and insurance are construed as sales within the meaning of section 3(k). (Sec. 3(k) of the act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.)

(c) It will be noted that the exempt work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." "Obtaining orders or * * * for the use of facilities" includes the selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the exemption as outside salesmen to employees who sell or take orders for a service, which is performed for the customer by someone other than the person taking the order. For example, it includes the salesman of a typewriter repair service who does not himself do the repairing. It also includes otherwise exempt outside salesmen who obtain orders for the laundering of the customer's own linens as well as those who obtain orders for the rental of the laundry's linens.

(e) The inclusion of the word "services" is not intended to exempt persons who, in a very loose sense, are sometimes described as selling "services". For example, it does not include persons such as servicemen even though they may sell the service which they themselves perform. Selling the service in such cases would be

BEST DOCUMENT AVAILABLE

incidental to the servicing rather than the reverse. Nor does it include outside buyers, who in a very loose sense are sometimes described as selling their employer's "service" to the person from whom they obtain their goods. It is obvious that the relationship here is the reverse of that of salesman-customer.

§ 541.502 Away from his employer's place of business.

(a) Section 541.5 requires that an outside salesman be customarily and regularly engaged "away from his employer's place or places of business". This requirement is based on the obvious connotation of the word "outside" in the term "outside salesman". It would obviously lie beyond the scope of the Administrator's authority that "outside salesman" should be construed to include inside salesmen. Inside sales and other inside work (except such as is directly in conjunction with and incidental to outside sales and solicitations, as explained in paragraph (b) of this section) is nonexempt.

(b) Characteristically the outside salesman is one who makes his sales at his customer's place of business. This is the reverse of sales made by mail or telephone (except where the telephone is used merely as an adjunct to personal calls). Thus any fixed site, whether home or office, used by a salesman as a headquarters or for telephonic solicitation of sales must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. It should not be inferred from the foregoing that an outside salesman loses his exemption by displaying his samples in hotel sample rooms as he travels from city to city; these sample rooms should not be considered as his employer's places of business.

§ 541.503 Incidental to and in conjunction with sales work.

Work performed "incidental to and in conjunction with the employee's own outside sales or solicitation" includes not only incidental deliveries and collections which are specifically mentioned in § 541.5(b), but also any other work performed by the employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences.

§ 541.504 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt work, depending upon the circumstances under which it is performed. Promotion men are not exempt as "outside salesmen." (This discussion relates solely to the exemption under § 541.5, dealing with outside salesmen. Promotion men who receive the required salary and otherwise qualify may be exempt as administrative employees.) However, any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work. Many persons are engaged in certain combinations of sales and promotional work or in certain types of promotional work having some of the characteristics of sales work while lacking others. The types of work involved include activities in borderline areas in which it is difficult to determine whether the work is sales or promotional. Where the work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work.

(b) (1) Typically, the problems presented involve distribution through jobbers (who employ their own salesmen) or through central warehouses of chainstore organizations or cooperative retail buying associations. A manufacturer's representative in such cases visits the retailer, either alone or accompanied by the jobber's salesman. In some instances the manufacturer's representative may sell directly to the retailer; in others, he may urge the retailer to buy from the jobber.

(2) This manufacturer's representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such persons can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else the work must be considered nonexempt. With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt. Incidental promotional activities may be tested by whether they are "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or whether they are incidental to sales which will be made by someone else.

(c) (1) A few illustrations of typical situations will be of assistance in determining whether a particular type of work is exempt or nonexempt under § 541.5. One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any orders he obtains to the local jobber to be filled. In such a case the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commitment from the customer.

(2) Another typical situation involves facts similar to those described in the preceding illustration with the difference that the jobber's salesman accompanies the representative of the company whose product is being sold. The order in this instance is taken by the jobber's salesman after the manufacturer's representative has done the preliminary work which may include arranging the stock, putting up a display or poster, and talking to the retailer for the purpose of getting him to place the order for the product with the jobber's salesman. In this instance the sale is consummated by the jobber's salesman. The work performed by the manufacturer's representative is not incidental to sales made by himself and is not exempt work. Moreover, even if in a particular instance the sale is consummated by the manufacturer's representative it is necessary to examine the nature of the work performed by the representative to determine whether his promotional activities are directed toward paving the way for his own present and future sales, or whether they are intended to stimulate the present and future sales of the jobber's salesman. If his work is related to his own sales it would be considered exempt work, while if it is directed toward stimulating sales by the jobber's representative it must be considered nonexempt work.

(3) Another type of situation involves representatives employed by utility companies engaged in furnishing gas or electricity to consumers. In a sense these representatives are employed for the purpose of "selling" the consumer an increased volume of the product of the utility. This "selling" is accomplished indirectly by persuading the consumer to purchase appliances which will result in a greater use of gas or electricity. Different methods are used by various companies. In some instances the utility representative after persuading the consumer to install a particular appliance may actually take the order for the appliance which is delivered from stock by his employer, or he may forward the order to an appliance dealer who then delivers it. In such cases the sales activity would be exempt, since it is directed at the consummation of a specific sale by the utility representative, the employer actually making the delivery in the one case, while in the other the sale is consummated in the

sense that the representative obtains an order or commitment from the customer. In another type of situation the utility representative persuades the consumer to buy the appliance and he may even accompany the consumer to an appliance store where the retailer shows the appliance and takes the order. In such instances the utility representative is not an outside salesman since he does not consummate the sale or direct his efforts toward making the sale himself. Similarly, the utility representative is not exempt as an outside salesman if he merely persuades the consumer to purchase an appliance and the consumer then goes to an appliance dealer and places his order.

(4) Still another type of situation involves the company representative who visits chainstores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chainstore company which later ships the quantity requested. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy) this work must be counted as nonexempt.

§ 541.505 Driver salesmen.

(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by § 541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in § 541.5. He must be a salesman by occupation. If he is, all work that he performs which is actually incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.

(b) Employees who may perform a combination of selling or sales promotion activities with product deliveries are employed in a number of industries. Distributors of carbonated beverages, beer, bottled water, food and dairy products of various kinds, cigars and other nonfood products commonly utilize such employees, variously known as routemen, route drivers, route salesmen, dealer salesmen, distributor salesmen, or driver salesmen. Some such emloyees deliver at retail to customers' homes; others deliver on wholesale routes to such customers as retail stores, restaurants, hospitals, hotels, taverns, and other business establishments. Whether such an employee qualifies as an outside salesman under the regulations depends, as stated in paragraph (a) of this section, on the content of the job as a whole and not on its title or designation or the kind of business in which the employer is engaged. Hearings in 1964 concerning the application of § 541.5 to such employees demonstrated that there is great variation in the nature and extent of sales activity and its significance as an element of the job, as among drivers whose duties are performed with respect to different products or different industries and also among drivers engaged in the same industry in delivering products to different types of customers. In some cases the facts may make it plain that such an employee is employed for the purpose of making sales; in other cases the facts are equally clear that he is employed for another purpose. Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales. It is equally clear, on the other hand, that a routeman whose chief duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations, is not selling his employer's product or employed for the purpose of making sales but is employed for purposes which, although important to the promotion of sales to customers using the machines, plainly cannot characterize the employee as a salesman by occupation. In other cases there may be more difficulty in determining whether the employee is employed for the purpose of making sales within the meaning of this part. The facts in such cases must be weighed in the light of the principles stated in paragraph (a) of this section, giving due consideration to the factors discussed in subsequent paragraphs of this section.

(c) One source of difficulty in determining the extent to which a route driver may actually be engaged in making sales arises from the fact that such a driver often calls on established customers day after day or week after week, delivering a quantity of his employer's products at each call. Plainly, such a driver is not making sales when he delivers orders to customers to whom he did not make the initial sale in amounts which are exactly or approximately prearranged by customer or contractual arrangement or in amounts specified by the customer and not significantly affected by solicitations of the customer by the delivering driver. Making such deliveries, as well as recurring deliveries the amounts of which are determined by the volume of sales by the customer since the previous delivery rather than by any sales effort of the driver, do not qualify the driver as an outside salesman nor are such deliveries and the work incident thereto directly to the making or soliciting of sales by the driver so as to be considered exempt work. On the other hand, route drivers are making sales when they actually obtain or solicit, at the stops on their routes, orders for their employer's products from persons who have authority to commit the customer for purchases. A driver who calls on new prospects for customers along his route and attempts to convince them of the desirability of accepting regular delivery of goods is likewise engaged in sales activity and is making sales to those from whom he obtains a commitment. Also, a driver salesman calling on established customers on his route, carrying an assortment of the articles which his employer sells, may be making sales by persuading regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery of the employer's products may have been made by someone else. Work which is performed incidental to and in conjunction with such sales activities will also be considered exempt work, provided such solicitation of the customer is frequent and regular. Incidental activities include loading the truck with the goods to be sold by the driver salesman, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.

(d) Neither delivery of goods sold by others nor sales promotion work as such constitutes making sales within the meaning of § 541.5; delivery men and promotion men are not employed in the capacity of outside salesmen for purposes of section 13(a)(1) of the act although both delivery work and promotion work are exempt salesman as an incident to his own sales or efforts to sell. The distinction between the making of sales and the promotion of sales is explained in more detail in the discussion and illustrations contained in § 541.504. Under the principles there stated a route driver, just as any other employee, must have as his chief duty and primary function the making of sales in the sense of obtaining and soliciting commitments to buy from the persons upon whom he calls if he is to qualify under the regulations as an employee employed in the capacity of outside salesman. For this reason, a route driver primarily engaged in making deliveries to his employer's customers and performing activities intended to promote sales by customers, including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves or in coolers or cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases, is not employed in the capacity of an outside salesman by reason of such work. Such work is nonexempt work for purposes of this part unless it is performed as an incident to or in conjunction with sales actually made by the driver to such customers. If the driver who performs such functions actually takes orders or obtains commitments from such customers for the products which he delivers, and the performance of the promotion work is in furtherance of his own sales efforts, his activities for that purpose in the customer's establishment would be exempt work.

(e) As indicated in paragraph (a) of this section, whether a route driver can qualify as an outside salesman depends on the facts which establish the content of his job as a whole. Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose of, is customarily and regularly engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truckdrivers and (2) salesmen; possession of a salesman's or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employee's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs nonexempt work in excess of the amount permitted by § 541.5, he would be nonexempt in any event and consideration of such factors as the foregoing would not be pertinent.

(f) The following examples will further illustrate the factual situations in which, under the principles discussed previously in this section, routemen engaged in recurrent deliveries of goods may qualify or may fail to qualify for exemption as outside salesmen.

(1) A retail routeman who regularly calls on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied to continue their orders for such goods but also to make such customers aware of other products which he would like to sell to them and to offer to take orders for such products or for increased amounts of the products which he is already delivering to the customer. In addition, he may call at prospective retail customers' homes for the purpose of persuading such persons to order the goods which he sells. A routeman who customarily and regularly calls on customers for these purposes and takes orders from them for products which he delivers to them, in addition to those products for which delivery has been prearranged, who is in practical effect his employer's exclusive sales contact with such customers, and whose earnings are in large part directly attributable to sales made to such customers, will be considered to

be employed in the capacity of outside salesman and within the exemption provided by section 13(a)(1) of the Act if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.

(2) A routeman who calls on retail stores which are among his employer's established customers may also qualify for exemption as an outside salesman notwithstanding the goods he delivers to them are of kinds and in amounts which are generally prearranged. Other facts may show that making sales is his chief duty and primary function and that he is customarily and regularly engaged in performing this function. Thus, such a routeman whose regular calls on established customers involve not only delivery of prearranged items but also active efforts to persuade such customers to continue or increase their orders for such goods and to solicit their orders for other kinds of products which he offers for sale, who also calls on retail stores which are prospective customers, talks to persons who are authorized to order goods for such stores, and solicits orders from them for the goods which he sells, and whose compensation is based primarily on the volume of sales attributable to his efforts, will be considered exempt as an outside salesman if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.

(3) If a routeman delivers goods to branch business establishments whose personnel have no authority to place orders or make commitments with respect to the kinds and amounts of such goods, and if the kinds and amounts of goods delivered are not determined pursuant to orders placed by the authorized personnel of the customer's enterprise as a result of sales solicitation by the routeman, it is clear that the routeman's calls on such branch establishments are not a part of the making of sales by him or incidental to sales made by him. If such work is his chief duty or primary function or if he spends a greater proportion of the workweek in such work than is allowed for nonexempt work under § 541.5, such a routeman cannot qualify for exemption as an "outside salesman".

(4) A routeman who delivers to supermarkets after the enterprise has been persuaded, by a salesman of the routeman's employer, to accept delivery of goods, and whose functions other than such deliveries are primarily to arrange merchandise, rotate stocks, place point-of-sale and other advertising materials, and engage in other activities which are intended to promote sales by the supermarkets of the goods he has delivered, is not employed primarily for the purpose of selling and is not customarily and regularly engaged in making sales. Rather, he is employed primarily to deliver goods and to perform activities in the supermarkets of a nature usually performed by store employees not employed as salesmen. Such a routeman is not employed in the capacity of outside salesman within the exemption provided by section 13(a)(1).

(5) Some employees are engaged in a combination of activities involving delivery, the selling of services, and the performance of the services. For example, some drivers call on customers for the purpose of selling pesticides and, if a sale is consummated, applying the pesticides on the customer's property. Such employees, like those referred to in § 541.501(e), are not exempt as outside salesmen. They are primarily engaged in delivery or service functions, not in outside selling.

§ 541.506 Nonexempt work generally

Nonexempt work is that work which is not sales work and is not performed incidental to and in conjunction with the outside sales activities of the employee. It includes outside activities like meter-reading, which are not part of the sales process. Inside sales and all work incidental thereto are also nonexempt work. So is clerical warehouse work which is not related to the employee's own sales. Similarly, the training of other salesmen is not exempt as outside sales work, with one exception. In some concerns it is the custom for the salesman to be accompanied by the trainee while actually making sales. Under such circumstances it appears that normally the trainer-salesman and the trainee make the various sales jointly, and both normally receive a commission thereon. In such instances, since both are engaged in making sales, the work of both is considered exempt work. However, the work of a helper who merely assists the salesman in transporting goods or samples and who is not directly concerned with effectuating the sale is nonexempt work.

§ 541.507 20-percent limitation on nonexempt work.

Nonexempt work in the definition of "outside salesman" is limited to "20 percent of the hours worked in the workweek by nonexempt employees of the employer." The 20 percent is computed on the basis of the hours worked by nonexempt employees of the employer who perform the kind of nonexempt work performed by the outside salesman. If there are no employees of the employer performing such nonexempt work, the base to be taken is 40 hours a week, and the amount of nonexempt work allowed will be 8 hours a week.

§ 541.508 Trainees, outside salesmen.

The exemption is applicable to an employee employed in the capacity of outside salesman and does not include employees training to become outside salesmen who are not actually performing the duties of an outside salesman (see also § 541.506).

SPECIAL PROBLEMS

§ 541.600 Combination exemptions

(a) The divisions' position under the regulations in Subpart A of this part permits the "tacking" of exempt work under one section of the regulations in Subpart A to exempt work under another section of those regulations, so that a person who, for example, performs a combination of executive and professional work may qualify for exemption. In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work. For instance, if the employee performs a combination of an executive's and an outside salesman's function (regardless of which occupies most of his time) he must meet the salary requirement for executives. Also, the total hours of nonexempt work under the definition of "executive" together with the hours of work which would not be exempt if he were clearly an outside salesman, must not exceed either 20 percent of his own time or 20 percent of the hours worked in the workweek by the nonexempt employees of the employer, whichever is the smaller amount.

(b) Under the principles in paragraph (a) of this section combinations of exemptions under the other sections of the regulations in Subpart A of this part are also permissible. In short, under the regulations in Subpart A, work which is "exempt" under one section of the regulations in Subpart A will not defeat the exemption under any other section.

§ 541.601 Special provision for motion picture producing industry.

Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $250 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least $250 a week is exempt if he is paid at least prorata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least $250 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least $250 and his daily base rate is at least one-sixth of such weekly base rate.

The higher minimum salary tests will be effective on April 1, 1975.

[40 FR 7094, Feb. 19, 1975]

Postponed Regulations: Section 541.601 was revised at 46 FR 3016, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.601 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.601 Special provision for motion picture producing industry.

Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $320 per week beginning Febraury 13, 1981 and $345 per week beginning February 13, 1983 (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 is exempt if he is paid at least pro-rata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least $320 per week beginning February 13, 1981 and $345 per week beginning February 13, 1983 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least $320 per week beginning February 13, 1983 and his daily base rate is at least one-sixth of such weekly base rate.

The higher minimum salary tests will be effective on February 13, 1981, and February 13, 1983, respectively.

§ 541.602 Special proviso concerning executive and administrative employees in multi-store retailing operations.

(a) The tolerance of up to 40 percent of the employee's time which is allowed for nonexempt work performed by an executive or administrative employee of a retail or service establishment does not apply to employees of a multiunit retailing operation, such as a chainstore system or a retail establishment having one or more branch stores, who perform central functions for the organization in physically separated establishments such as warehouses, central office buildings or other central service units or by traveling from store to store. Nor does this special tolerance apply to employees who perform central office, warehousing, or service functions in a multi-unit retailing operation by reason of the fact that the space provided for such work is located in a portion or portions of the building in which the main retail or service establishment or another retail outlet of the organization is also situated. Such employees are subject to the 20-percent limitation on nonexempt work.

(b) With respect to executive or administrative employees stationed in the main store of a multistore retailing operation who engage in activities (other than central office functions) which relate to the operations of the main store, and also to the operations of one or more physically separated units, such as branch stores, of the same retailing operation, the Divisions will, as an enforcement policy, assert no disqualification of such an employee for the section 13(a 1) exemption by reason of nonexempt activities if the employee devotes less than 40 percent of his time to such nonexempt activities. This enforcement policy would apply, for example, in the case of a buyer who works in the main store of a multistore retailing operation and who not only manages the millinery department in the main store, but is also responsible for buying some or all of the merchandise sold in the millinery departments of the branch stores.

OCCUPATIONAL INDEX

NOTE: This index lists, for ease of reference, the sections of this part which refer to job titles. The user should note, however, that where job titles do appear in the illustrations in the text, they should not be construed to mean that employees holding such titles are either exempt or nonexempt or that they meet any one of the specific requirements for exemption.

Accountant, 541.302
Account executive, 541.201, 541.205
Actor, 541.303
Adjuster, 541.205
Advisory specialist, 541.205
Analyst, wage rate, 541.201, 541.205
Animator, 541.303
Announcer, radio, 541.303
Announcer, television, 541.303
Artist, 541.303, 541.313

Assistant, administrative, 541.201, 541.205, 541.207, 541.208
Assistant buyer, 541.105, 541.201, 541.205
Assistant, confidential, 541.201
Assistant, executive, 541.201
Assistant department head, 541.105
Assistant to general manager, 541.201
Assistant to president, 541.201, 541.207
Auditor, traveling, 541.201
Bookkeeper, 541.205, 541.207
Bookkeeper, head, 541.115
Broker, customers', 541.201, 541.205, 541.207
Buyer, 541.108, 541.201, 541.205, 541.207, 541.501, 541.602
Buyer, assistant, 541.105, 541.201, 541.205
Buyer, lease, 541.201
Buyer, outside, 541.501
Buyer, resident, 541.205
Carpenter, 541.119
Cartoonist, 541.303
Cashier, bank, 541.205
Checker, 541.108
Chemist, 541.302, 541.306, 541.307
Claim agent, 541.205
Clerk, 541.205
Clerk, accounting, 541.302
Clerk, chief, 541.115
Clerk, counter, 541.109
Clerk, shipping, 541.207
Columnist, 541.303
Company representative, 541.504
Comparison shopper, 541.207, 541.504
Composer, 541.303
Computer operator, 541.108, 541.207
Computer programer, 541.108, 541.205, 541.207, 541.302
Conductor, 541.303
Consultant, 541.205, 541.207, 541.208
Contact man, 541.201, 541.207
Copyist (motion picture), 541.303
Craftsman, 541.119
Credit manager, 541.201, 541.205, 541.207, 541.208
Delivery man, 541.505
Dentist, 541.314
Department head, assistant, 541.105
Dietitian, 541.202, 541.314
Doctor, 541.306, 541.314
Draftsman, 541.308
Dramatic critic, 541.303
Driver salesman, 541.505
Engineer, 541.302, 541.308
Engineer, junior, 541.308
Essayist, 541.303
Examiner, 541.108, 541.207
Executive secretary, 541.201
Financial consultant, 541.205
Foreign exchange consultant, 541.201
Foreman-cutter, 541.115
Foreman-examiner, 541.108
Foreman-fixer (hosiery), 541.115
Foreman-machine adjuster, 541.108
Foreman-"setup" man, 541.108
Foreman, construction, 541.104
Foreman, garment shop, 541.115
Foreman, installation, 541.104
Foreman, planer-mill, 541.115
Foreman, shipping room, 541.115
Foreman, warehouse, 541.115
Foreman, working, 541.115
Gang leader, 541.115
Gauger (oil company), 541.201
Group leader, 541.115
Grader, 541.207
Head bookkeeper, 541.115
Head shipper, 541.115
Illustrator, 541.313
Inside salesman, 541.502
Inspector, 541.108, 541.207
Inspector, insurance, 541.205
Insurance expert, 541.201
Interns, 541.314
Inventory man, traveling, 541.201
Investment consultant, 541.201
Jobber's representative, 541.504
Jobber's salesman, 541.504
Journalist, 541.303
Key punch operator, 541.207
Junior programer, 541.207
Labor relations consultant, 541.205
Labor relations director, 541.201
Lawyer, 541.302, 541.314
Legal stenographer, 541.302
Librarian, 541.308
Linotype operator, 541.119
Location manager, motion picture, 541.201
Lumber grader, 541.207
Machine shop supervisor, 541.105
Manager, branch, 541.113, 541.118
Manager, credit, 541.201, 541.205, 541.207, 541.208
Manager, cleaning establishment, 541.109
Manager, office, 541.115, 541.208
Manager, traffic, 541.208
Management consultant, 541.207, 541.208
Manufacturer's representative, 541.504
Mechanic, 541.119
Medical technologist, 541.203, 541.306
Methods engineer, 541.201
Mine superintendent, 541.109
Motion picture producing industry, employees in, 541.601
Musician, 541.303
Newspaper writer, 541.303
Novelist, 541.303
Nurse, 541.314
Office manager, 541.115, 541.208
Optometrist, 541.314
Organization planner, 541.201
Painter, 541.303
Personnel clerk, 541.205, 541.207
Personnel director, 541.201
Personnel manager, 541.205, 541.207
Pharmacist, 541.314
Physician, 541.306, 541.314
Physician, general practitioner, 541.314
Physician, intern, 541.314
Physician, osteopathic, 541.314
Physician, resident, 541.314
Planer-mill foreman, 541.115
Podiatrist, 541.314
Production control supervisor, 541.201
Programer trainee, 541.207

Promotion man, 541.201, 541.205, 541.504, 541.505
Psychologist, 541.202, 541.314
Psychometrist, 541.314
Purchasing agent, 541.201, 541.207
Radio announcer, 541.303
Ratesetter, 541.201
Registered nurse, 541.302
Reporter, 541.303
Representative, company, 541.504
Representative, jobber's, 541.504
Representative, manufacturer's, 541.504
Representative, utility, 541.504
Resident buyer, 541.205
Retail routeman, 541.505
Retoucher, photographic, 541.303
Route driver, 541.505
Routeman, 541.505
Routeman, retail, 541.505
Safety director, 541.201, 541.205
Salesman, dealer, 541.505
Salesman, distributor, 541.505
Salesman, driver, 541.505
Salesman, inside, 541.502
Salesman, jobber's, 541.504
Salesman, laundry, 541.501
Salesman, mail, 541.502
Salesman, route, 541.505
Salesman, telephone, 541.502
Salesman, typewriter repair, 541.501
Salesman, wholesale, 541.207
Salesman's helper, 541.506
Sales research expert, 541.201
Sanitarian, 541.314
School building manager, 541.202
School department head, 541.201
School lunch room manager, 541.202
School maintenance man, 541.202
School principal, 541.201
School superintendent, 541.201
School vice principal, 541.201
Secretary, 541.205
Secretary, executive, 541.201
Serviceman, 541.501
Shipper, head, 541.115
Shipping clerk, 541.207
Shipping room foreman, 541.115
Singer, 541.303, 541.313
Social worker, 541.202, 541.314
Statistician, 541.201, 541.205
Strawboss, 541.115
Supervisor, production control, 541.201
Tape librarian, 541.207
Tax consultant, 541.205
Tax expert, 541.201, 541.205
Teacher, 541.215, 541.300, 541.302, 541.304, 541.307, 541.315
Technologist, 541.314
Television announcer, 541.303
Teller, bank, 541.205, 541.207
Therapist, 541.314
Timekeeper, 541.108
Traffic manager, 541.208
Trainee, 541.116, 541.210, 541.308, 541.310, 541.506, 541.508
Trainer-salesman, 541.506
Truck driver, 541.207, 541.505
Utility representative, 541.201, 541.504
Violinist, 541.303
Working foreman, 541.115
Working supervisor, 541.115
Writer, advertising, 541.303
Writer, fiction, 541.303
Writer, newspaper, 541.303
Writer, scenario, 541.303
Writer, short story, 541.303
X-ray technician, 541.306

PART 545—HOMEWORKERS IN INDUSTRIES IN PUERTO RICO

Sec.
545.1 Applicability.
545.2 Definitions.
545.3 Filing and notification requirements.
545.4 Preparation of goods for delivery.
545.5 Delivery and collection of goods.
545.6 Payment for work.
545.7 Records to be kept.
545.8 Reporting names of subcontractors, agents, or other homework distributors.
545.9 Minimum piece rates prescribed by the Administrator.
545.10 Piece rates adopted by employers.
545.11 Penalties.
545.12 Petition for amendment of regulations.
545.100 Enforcement policies.

Authority: Secs. 6, 11, 52 Stat. 1062, as amended, 1066, as amended; 29 U.S.C. 206, 211.

Source: 20 FR 8372, Nov. 9, 1955, unless otherwise noted.

§ 545.1 Applicability.

The provisions of this part shall apply to persons in activities relating to homeworkers engaged in commerce or the production of goods for commerce in industries in Puerto Rico.

[36 FR 21811, Nov. 16, 1971]

§ 545.2 Definitions.

(a) The meaning of the terms "person," "employer," "employee," "goods," and "production," as used in this part, is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Homeworker", as used in this part, means any employee employed or suffered or permitted to perform homework for an employer.

(c) "Homework", as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment, of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production; *Provided*, That such work is not performed under the constant and direct supervision of an employer or of a responsible supervisor and under such conditions that accurate records of hours worked are maintained or can readily be maintained.

(d) "Contractor" means any employer in Puerto Rico who contracts for the performance of work on goods to which a person other than the contractor holds title.

(e) "Prime contractor" means any contractor in Puerto Rico who contracts directly with the person holding title to the goods.

(f) "Subcontractor" means any contractor in Puerto Rico other than a prime contractor.

(g) "Manufacturer" means any employer in Puerto Rico other than a contractor, who is engaged in processing goods.

(h) "Operation" means any work or any process performed on or with goods other than the distribution of goods to or collection of goods from homeworkers.

§ 545.3 Filing and notification requirements.

(a) Every prime contractor or manufacturer, prior to the distribution of work, directly or through a subcontractor or agent, to any homeworker, or prior to the commencement of work by a homeworker in cases where the homeworker purchases the raw materials, shall file with the Wage and Hour Division in Puerto Rico the following: A clear and legible stamped copy of each design, if any, and in the absence of such design, a finished sample, of the goods to be distributed, or to be produced by the homeworker; a description in writing of each operation to be performed by the homeworker, whether or not part of a design; the full piece rate schedule designation, if any, and the corresponding piece rate to be paid for each such operation; the total piece rate for the finished unit or part of unit; and the style number or name, if any, of the goods upon which such operations are to be performed. In the absence of a style number or name, the prime contractor or manufacturer shall file any other identification number or name by which the goods are known.

(b) No change shall be made by a prime contractor or manufacturer in any style or identification number or name filed as required by this section, or in the operations to be performed thereunder, unless prior written notification of such change is given to the Wage and Hour Division in Puerto Rico.

(c) Any design, sample, piece rate, style or other identification number or name, or description of operation, filed under this section shall be valid, for the purposes of the regulations in this part, for a period of three years, commencing on the date it is received by the Wage and Hour Division in Puerto Rico. After the expiration of this period, no goods covered thereby shall be distributed to homeworkers unless a new notification and filing, as required by the first paragraph of this section, has been previously made by the prime contractor of manufacturer.

(d) No prime contractor or manufacturer shall distribute work to homeworkers under a firm name other than the one under which such work has been filed with the Wage and Hour Division in Puerto Rico pursuant to the requirements of this section.

(e) Any design or sample filed under the provisions of this section may be retained by the Wage and Hour Division for the period deemed necessary for enforcement of the provisions of the Fair Labor Standards Act.

[20 FR 8372, Nov. 9, 1955, as amended at 22 FR 1373, Mar. 6, 1957; 36 FR 21811, Nov. 16, 1971]

§ 545.4 Preparation of goods for delivery.

Where homework is distributed through a subcontractor, each prime contractor or manufacturer for whom such distribution is made shall make up into lots any goods to be so distributed, each lot to comprise goods on which the same operations are to be performed.

§ 545.5 Delivery and collection of goods.

Homework shall in each instance be distributed to and collected from the individual homeworker who is to perform or has performed the work on it, and no other person may act for or on behalf of any homeworker in this connection.

§ 545.6 Payment for work.

When a prime contractor or manufacturer receives completed homework directly from an individual homeworker, payment shall be made to such homeworker immediately. When, however, such completed homework is received through a subcontractor, payment shall be made to the subcontractor immediately upon receipt, and the subcontractor shall pay the homeworker who performed the work within seven days from the date on which the subcontractor was paid. Payment shall be made to each homeworker at rates not less than those required under §§ 545.9 and 545.10, and in accordance with the requirements of section 6 and 7 of the act. In addition, where costs are incurred by a homeworker for equipment, material, or other items, such as fuel and electricity, as a result of homework, the prime contractor or manufacturer for whom such homework was performed shall, either directly or through a subcontractor, reimburse the homeworker for such costs, to the extent necessary to provide compensation for the labor performed at least commensurate with the piece rates required by §§ 545.9 and 545.10.

§ 545.7 Records to be kept.

(a) Every prime contractor or manufacturer shall make and have available at his principal Puerto Rican office a record of the following information:[1]

(1) The name and address of each firm situated outside the Island of Puerto Rico, if any, from which the goods upon which homework is to be performed were received.

(2) The name and address of each subcontractor, if any, to whom each lot of goods was delivered for delivery to homeworkers, together with the number of the permit issued to such subcontractor by the Department of Labor of Puerto Rico.

(3) The date or dates upon which each lot of goods was delivered to and returned by a subcontractor, if any, together with a description of such goods, the net amount paid as commission and the rate of commission on such goods.

(4) The name and address of each homeworker, and the date of birth of each homeworker under 19, to whom the goods in each lot were delivered or from whom goods were purchased.

(5) The date or dates upon which the goods in each lot were delivered to and collected from each homeworker or upon which goods were purchased from each homeworker.

(6) The style number or name or, if none, the identification number or name used in lieu thereof, the description of and amount of goods in each lot or the amount of goods purchased from each homeworker, the operations to be performed or performed thereon, the piece rates to be paid or paid the gross amount due each homeworker for the operations performed upon the goods, social security deductions from that amount, the costs, if any, incurred by the homeworker for equipment, material, or other items such as

---

[1] Although responsibility for making the record is placed upon the prime contractor or manufacturer, the actual work of doing so may be performed by supervisory or clerical employees, agents, subcontractors, or other persons acting in his behalf. No particular order or form of records is prescribed by the regulations contained in this part. The prime contractor or manufacturer may keep his own record system, so long as he keeps all the required information available in understandable form. The records must be kept in the principal Puerto Rican office of the prime contractor or manufacturer. Where it is not possible for a record of one or more of the items to be made in the first instance as the principal office of the prime contractor or manufacturer, at his direction the record of such items may be made away from that office by a subcontractor, agent, employee, or other person acting in his behalf. In such event, however, the records shall be delivered to the principal Puerto Rican office of the prime contractor or manufacturer as soon as practicable after the making of such entries, and shall there be preserved and available for inspection.

electricity or fuel as a result of the homework, the amount actually paid the homeworker and the date of payment.

(b) At the time work is given out to or received or purchased from a homeworker, as the case may be, every prime contractor or manufacturer shall enter the following information in the handbook (to be obtained by the prime contractor or manufacturer from the Wage and Hour Division and supplied by him to each homeworker) which shall be kept by the homeworker until the handbook is completed (that is, until no space remains for additional entries) or the homeworker's services are terminated, at which time it shall be returned to the prime contractor or manufacturer:[2]

(1) The date or dates upon which the goods in each lot were delivered to and collected from the homeworker or upon which goods were purchased from the homeworker.

(2) The style number or name, or, if none, the identification number or name used in lieu thereof, the description of, and amount of goods in each lot or the amount of goods purchased from each homeworker, the operations to be performed or performed thereon, the piece rates to be paid or paid, the gross amount due each homeworker for the operations performed upon the goods, social security deductions from that amount, the costs, if any, incurred by the homeworker for equipment, material, or other items such as electricity or fuel as a result of homework, the amount actually paid the homeworker, and the date of payment.

(3) The signature of the person acting in behalf of the prime contractor or manufacturer.

(c) No prime contractor or manufacturer shall employ any homeworker for more than 40 hours in any workweek unless, in addition to the records which he is required to keep pursuant to paragraphs (a) and (b) of this section, such prime contractor or manufacturer makes and keeps available at his principal Puerto Rican office and enters in the handbook of each such homeworker a record of the following information:[2a]

(1) The hours worked by the homeworker on the goods in each lot.

(2) The total hours worked each week.

(3) The wages paid the homeworker each week at regular piece rates.

(4) The extra amount paid to the homeworker for hours worked in excess of 40 in each week.

(d) Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to section 16(c) of the act shall:

(1) Record and preserve, as an entry on his payroll or other pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on the receipt form provided or authorized by the Wage and Hour Division, and (i) preserve a copy as part of his records, (ii) deliver a copy to the employee, and (iii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Administrator or his authorized representative within 10 days after payment is made.

(e) Every employer shall keep and preserve for a period of not less than three years at his place of business all records required in this section, except the handbook which shall be kept for a period of two years subsequent to the date of the last entry therein. All such records shall be open at any time to inspection and transcription by the Administrator or his authorized representative.

[22 FR 10693, Dec. 25, 1957, as amended at 36 FR 21811, Nov. 16, 1971]

§ 545.8 Reporting names of subcontractors, agents, or other homework distributors.

Every prime contractor or manufacturer shall report to the office of the Wage and Hour Division, United States Department of Labor, Mayaguez, Puerto Rico, (a) the names and addresses of all persons engaged or used as subcontractors, as that term is defined in this part, or as agents or supervisors in charge of any branch office, and (b) the permit numbers issued to such persons by the Department of Labor of Puerto Rico.

---

[2] Although responsibility for supplying the handbook to the homeworker and recording information therein is placed upon the prime contractor or manufacturer, the actual work of doing so may be performed by supervisory or clerical employees, agents, subcontractors or other persons acting in his behalf.

§ 545.9 Minimum piece rates prescribed by the Administrator.

Pursuant to the provisions of section 6(a)(2) of the act, each homeworker shall be paid in lieu of the applicable minimum hourly rates established by wage order, not less than the piece rates prescribed in this section for the operations described herein. On and after the effective date of any increase in any applicable minimum hourly rate established by said wage orders and until the effective date of corresponding revisions in this section, the minimum piece rates which shall be paid are those given in this section adjusted in the same ratio as the change in the old and new applicable minimum hourly rates.

(a) *Minimum piece rates for the gloves and mittens industry in Puerto Rico.* The piece rates given below have been adjusted to reflect increases in the minimum hourly wage rates for the "handsewing on fabric gloves" and the "handsewing on leather gloves" classifications. The piece rates shown are those which became effective on May 1, 1974 and those effective May 1, 1975 as a result of the Fair Labor Standards Amendments of 1974. The piece rates for operations on fabric gloves are based upon the minimum hourly rate for the "hand-sewing on leather gloves" classification which was increased from 50 cents to $1.20 on May 1, 1974, and to $1.32 effective May 1, 1975. The piece rates for operations on leather gloves are based upon the minimum hourly rate for the "hand-sewing on leather gloves" classification which was increased from 80 cents to $1.20 on May 1, 1975. Each piece rate below his been increased by the same percent as the hourly rate upon which it is based was increased.

(1) Piece rates effective May 1, 1974.

Rate No.	Operations	Fabric gloves for ladies (cents)	Leather gloves		Unit of payment
			Ladies' (cents)	Men's (cents)	
5	Feather stitch, 5 to 6 stitches per inch	1.877	0.491		Per inch.
6	Large stitch (husky), 5 to 6 stitches per inch			1.479	Do.
7	Regular stitch, 5 to 6 stitches per inch	1.231	1.553	1.479	Do.
8	Slip stitch, hem only, 5 to 6 stitches per inch	.794	1.061	1.061	Do.
10	Swagger stitch, 5 to 6 stitches per inch	1.231	1.553	1.479	Do.
11	Whip stitch, 5 to 6 stitches per inch	1.231	1.553	1.479	Do.

(2) Piece rates effective May 1, 1975.

Rate No	Operations	Fabric gloves for ladies (cents)	Leather gloves		Unit of payment
			Ladies' (cents)	Men's (cents)	
5	Feather stitch, 5 to 6 stitches per inch	2.065	0.540		Per inch.
6	Large stitch (husky), 5 to 6 stitches per inch			1.627	Do.
7	Regular stitch (husky), 5 to 6 stitches per inch	1.354	1.708	1.627	Do.
8	Slip stitch, hem only, 5 to 6 stitches per inch	.873	1.167	1.127	Do.
10	Swagger stitch, 5 to 6 stitches per inch	1.354	1.708	1.627	Do.
11	Whip stitch, 5 to 6 stitches per inch	1.354	1.708	1.627	Do.

(b) *Minimum piece rates for the handkerchief, scarf, and art linen industry in Puerto Rico.* The piece rates given below have been adjusted to reflect increases in the minimum hourly wage rates in the industry. The piece rates shown are those which became effective on May 1, 1974 and those effective May 1, 1975, as a result of the Fair Labor Standards Amendments of

BEST DOCUMENT AVAILABLE

1974. Of the rates given below, number 37(b) is based upon the minimum hourly rate for the "oblong scarves" classification which was increased from $1.60 to $1.75 on May 1, 1974, and to $1.90 effective May 1, 1975. Rates numbered 106, 107, and 108 are based upon the minimum hourly rate for the "other operations on products other than oblong scarves" classification which was increased from 85 cents to $1.20 on May 1, 1974, and to $1.32 effective May 1, 1975. All other piece rates are based upon the minimum hourly rate for the "handsewing on products other than oblong scarves" classification, which was increased from 78 cents to $1.20 on May 1, 1974, and to $1.32 effective May 1, 1975. Each piece rate below has been increased by the same percent as the hourly rate upon which it is based was increased.

Rate No	Operations	Effective May 1, 1974 (cents)	Effective May 1, 1975 (cents)	Unit of payment
1	Arenillas (seed stitch), close, 1/2 in squares	144.00	158.40	Per dozen.
2	Arenillas (seed stich), scattered 1/2 in squares	72.00	79.20	Do.
5	Basting stitch for trimming, forming crosses, etc., 4 stitches per inch	6.00	6.60	Per dozen inches.
6	Basting and folding hem on edges up to 1 1/2 inch hem	2.40	2.64	Do.
7	Blind hemstitch	24.00	26.40	Do.
8	Buttonhole stitch, 16 stitches per inch	24.00	26.40	Do.
9	Buttonhole stitch, 24 to 30 stitches per inch	36.00	39.60	Do.
10	Chain stitch, 4 stitches per inch	6.00	6.60	Do.
11	Chain stitch, 8 stitches per inch	12.00	13.20	Do.
12	Cord, solid, on stem	37.55	41.31	Do.
15	Couching or flat cord, 4 stitches per inch	6.00	6.60	Do.
16	Cross stitch, 6 crosses per inch	25.55	28.11	Do.
18	Daisies, 12 to 15 stitches, with double embroidery thread	36.00	39.60	Per dozen.
20	Dots, baby, not finished off, 2 to 3 stitches	9.95	10.95	Do.
21	Dots, large, not filled in, finished off, 12 stitches	18.00	19.80	Per dozen.
22	Dots, large filled in, finished off, over 12 stitches	36.00	39.60	Do.
23	Dots, large, not filled in, finished off, over 12 stitches	24.00	26.40	Do.
24	Dots, medium, not filled in, finished off, 8 to 9 stitches	15.85	17.44	Do.
25	Dots, medium, in groups, not finished off, 5 stitches, with double embroidery thread.	10.22	11.24	Do.
26	Dots, medium, finished off, 5 stitches, with double embroidery thread.	13.55	14.91	Do.
28	Embroidery, solid, straight, or diagonal, same as image stitch, filled in, loose.	48.00	52.80	Per dozen inches.
29	Embroidery, solid, straight or diagonal, same as image stitch, not filled in, loose.	36.00	39.60	Do.
31	Feather stitch, 12 stitches per inch	26.68	29.35	Do.
32	Feather stitch cord	14.08	15.49	Do.
34	French knots, not finished off	5.05	5.56	Per dozen.
35	French knots, finished off, with double embroidery thread	9.60	10.56	Do.
37	Hand or French rolling, 10 stitches or less per inch:			
	(a) Square scarves	33.92	37.31	Per 48 inches.
	(b) Oblong scarves	49.46	53.70	Do.
38	Hand or French rolling, 11 stitches or more per inch	40.75	44.83	Do.
46	Leaves, simple	4.48	4.93	Per dozen.
47	Leaves, solid, not finished off, 1/4 in long	15.95	17.55	Do.
48	Leaves, solid, not finished off, 3/8 in to 1/2 in long	24.00	26.40	Do.
49	Leaves, solid, not finished off, 5/8 in to 3/4 in long	48.00	52.80	Do.
69	Rose buds, worm stitch, 4 worms, 2 colors or tones	35.65	39.22	Do.
71	Shadow stitch, up to 3/8 in wide	77.31	85.04	Do.
72	Spiders, 4 legs	24.00	26.40	Do.
73	Spiders, 8 legs	46.94	51.63	Do.
	SCALLOP CUTTING			
	Hand-cutting machine-embroidered shallow, curved scallops on handkerchiefs or square scarves:			
106	Small, measuring from 5/16 in up to but not including 5/8 in along outside edge.	63.54	69.89	Per dozen scallops.
107	Medium, measuring from 5/8 in up to but not including 7/8 in along outside edge.	80.00	88.00	Do.
108	Large, measuring from 7/8 in to and inclusive of 1 1/4 in along outside edge.	120.00	132.00	Do.

BEST DOCUMENT AVAILABLE

Rate No.	Operations	Effective May 1, 1974 (cents)	Effective May 1, 1975 (cents)	Unit of payment
	NEEDLEPOINT OPERATIONS [1]			
109	Compact florals, figures, and landscapes [2]	124.80	137.28	Per 1,000 stitches.
110	Scattered florals [3]	134.40	147.84	Do.
111	Scattered florals consisting of borders or garlands only	144.00	158.40	Do.
112	Combinations of compact center and scattered borders in which the compact portion totals 45 percent or more of the total design.	134.40	147.84	Do.
113	Combinations of compact center and scattered borders in which the compact portion totals less than 45 percent of the entire design.	144.00	158.40	Do.
114	Must be added to the above piece rates to cover thumbtack mounting on frame for each piece of canvas.	9.60	10.56	
	Employers using other methods must set individual rates for mounting and removing canvas in accordance with Section 545.10.			

[1] These piece rates do not apply to the following types of needlepoint: a. Florals having more than 10,000 stitches. b. Florals having more than 36 color tones. c. Figures and landscapes having more than 3,000 stitches. d. Figures and landscapes having more than 25 color tones. e. Petit point. f. Stamped grospoint.

[2] A compact design is one in which 50 percent or more of the finished piece contains no spaces of unsewn canvas.

[3] A scattered design is one in which 50 percent or more of the component parts, when finished, are separated by spaces of unsewn canvas.

(c) *Minimum piece rates for the children's dress and related products industry in Puerto Rico.* The piece rates given below have been adjusted to reflect increases in the minimum hourly wage rates for this industry. All activities covered in this industry increased from $1.60 to $1.75 an hour on May 1, 1974, and to $1.90 an hour effective May 1, 1975, as a result of the Fair Labor Standards Amendments of 1974. Each piece rate has been increased by the same percent as the hourly rate was increased.

Rate No.	Operations	Effective May 1, 1974 (cents)	Effective May 1, 1975 (cents)	Unit of payment
11	Buttons sewed on with double thread, 2 to 3 stitches	24.37	26.46	Per dozen.
14	Buttonhole stitch, close	157.50	171.00	Per yard.
23	Dots, baby, not finished off, 2 to 3 stitches	14.58	15.83	Per dozen.
24	Dots, medium, not filled in, finished off, 8 to 9 stitches	23.09	25.07	Do.
29	Feather stitch, 12 stitches per inch	116.66	126.66	Per yard.
30	Feather stitch cord	61.41	66.67	Do.
32	French knots, not finished off	6.81	7.39	Per dozen.
41	Leaves, open 1/4 inch long	70.00	76.00	Do.
42	Leaves, open 3/8 inch to 1/2 inch long	105.00	114.00	Do.
43	Leaves, simple	6.54	7.10	Do.
44	Leaves, solid, not finished off, 1/8 inch long	19.21	20.86	Do.
45	Leaves, solid, not finished off, 1/4 inch long	23.34	25.34	Do.
46	Leaves, solid, not finished off, 3/8 inch to 1/2 inch long	35.00	38.00	Do.
47	Leaves, solid, finished off, 5/8 inch to 3/4 inch long	70.00	76.00	Do.
61	Rose buds, worm stitch 4 worms, 1 or 2 colors or tones	52.00	56.46	Do.
62	Running stitch on hems up to 1 inch wide, 12 stitches per inch	50.39	54.71	Per yard.
63	Running stitch on lace	46.45	50.43	Do.
64	Running stitch for plain sewing	31.65	34.36	Do.
72	Smocking	1.44	1.56	Per dozen stitches.
78	Tucks, stamped, 1/16 inch to 1/4 inch wide, up to 6 inches long.	54.75	59.44	Per dozen.

(d) *Minimum piece rates for the women's and children's underwear and women's blouse industry in Puerto Rico.* The piece rates given below have been adjusted to reflect increases in the minimum hourly wage rate for activities in the "pre-1961 coverage" classification of this industry. The minimum wage rate for these activities was increased from $1.54 to $1.69 an hour on May 1, 1974, and to $1.84 an hour effective May 1, 1975 as a result of the

BEST DOCUMENT AVAILABLE

Fair Labor Standards Amendments of 1974. Each piece rate below has been increased by the same percent as the hourly rate upon which it is based was increased. The piece rates for rates numbered 11, 38 and 73 are not applicable when the operations are performed on articles wholly machine sewn or machine knit.

(1) Piece rates effective May 1, 1974.

Rate No.	Operations	Blouses, neckwear, and silk and synthetic underwear and nightwear (cents)	Cotton underwear and nightwear (cents)	Unit of payment
11	Buttons sewed on with double thread, 2 to 3 stitches	24.04	21.62	Per dozen.
14	Buttonhole stitch, close	165.60	149.04	Per yard.
16	Cutting material applied over lace with hand-embroidered solid cord stitch.	25.24	22.68	Do.
17	Hand cutting material over lace applique or other material and at edges of garment following machine embroidered cord, large outline, around scallops measuring 1 in or more.	3.73		Do.
18	Hand cutting material over lace applique or other material and at edges of garment following machine embroidered cord, small outline, around scallops measuring less than 1 in.	8.44		Do.
19	Cutting material under lace or at seams, straight outline, following hand-sewing operation.	10.34	9.32	Do.
20	Cutting material under lace or at seams, straight outline, following machine operations.	10.34	10.34	Do.
21	Hand cutting material underneath straight or nearly straight outline.	2.86		Do.
22	Hand cutting material underneath irregular outline	4.28		Do.
23	Dots, baby, not finished off, 2 to 3 stitches	15.32	13.83	Per dozen.
24	Dots, medium, not filled in, finished off, 8 to 9 stitches	24.29	21.87	Per dozen.
29	Feather stitch, 12 stitches per inch	122.68	110.40	Per yard.
30	Feather stitch cord	64.56	58.11	Do.
32	French knots, not finished off	7.69	6.90	Per dozen.
38	Hemming stitch for felling, cuffs, collars, plackets, and waist bands, 8 to 10 stitches per inch.	82.31	74.09	Per yard.
41	Leaves, open, 1/4 in long	73.60	66.24	Per dozen.
42	Leaves, open, 3/8 in to 1/2 in long	110.40	99.36	Do.
43	Leaves, simple	7.69	6.16	Do.
44	Leaves, solid, not finished off, 1/8 in long	20.22	18.19	Do.
45	Leaves, solid, not finished off, 1/4 in long	24.52	22.08	Do.
46	Leaves, solid, not finished, off 3/8 in to 1/2 in long	36.80	33.12	Do.
47	Leaves, solid, finished off, 5/8 in to 3/4 in long	73.60	66.24	Do.
52	Pasadas, short, 1 in to 8 in		17.16	Per dozen pasadas.
53	Patches, sewed on with single point suture	366.53	329.88	Per yard.
54	Patches, rectangular, sewed on with blind stitch, up to 1 1/2 in	23.15	20.82	Per dozen inches.
55	Patches, sewed on with solid cord, cutting and basting included	360.64	324.58	Per yard
61	Rose buds, worm stitch, 4 worms, 1 or 2 colors or tones	54.68	49.19	Per dozen.
66	Shadow stitch, up to 3/8 in wide	355.72	320.16	Per yard.
72	Smocking	1.51	1.35	Per dozen stitches.
73	Snaps, sewing on both sides	36.80	33.12	Per dozen.
78	Tucks, stamped, 1/16 in to 1/4 in wide, up to 6 in long	57.56	51.81	Do.

(2) Piece rates effective May 1, 1975.

Rate No.	Operations	Blouses, neckwear, and silk and synthetic underwear and nightwear (cents)	Cotton underwear and nightwear (cents)	Unit of payment
11	Buttons sewed on with double thread, 2 to 3 stitches	22.08	19.86	Per dozen.
14	Buttonhole stitch, close	152.10	136.89	Per yard.
16	Cutting material applied over lace with hand-embroidered solid cord stitch.	23.18	20.83	Do.

BEST DOCUMENT AVAILABLE

Rate No.	Operations	Blouses, neckwear, and silk and synthetic underwear and nightwear (cents)	Cotton underwear and nightwear (cents)	Unit of payment
17	Hand cutting material over lace applique or other material and at edges of garment following machine embroidered cord, large outline, around scallops measuring 1 in or more.	3.43	....	Do.
18	Hand-cutting material over lace applique or other material and at edges of garment following machine embroidered cord, small outline around scallops measuring less than 1 in.	7.75	....	Do.
19	Cutting material under lace or at seams, straight outline, following hand-sewing operation.	9.50	8.56	Do.
20	Cutting material under lace or at seams, straight outline, following machine operations.	9.50	9.50	Do.
21	Hand-cutting material underneath straight or nearly straight outline.	2.63	....	Do.
22	Hand-cutting material underneath irregular outline	3.93	....	Do.
23	Dots, baby, not finished off, 2 to 3 stitches	1407	12.70	Per dozen.
24	Dots, medium, not filled in, finished off, 8 to 9 stitches	22.31	20.09	Do.
29	Feather stitch, 12 stitches per inch	112.68	101.40	Per yard.
30	Feather stitch cord	59.30	53.37	Do.
32	French knots, not finished off	7.06	6.34	Per dozen.
38	Hemming stitch for felling, cuffs, collars, plackets, and waist bands, 8 to 10 stitches per inch.	75.60	68.05	Per yard.
41	Leaves, open, 1/4 in long	67.60	60.84	Per dozen.
42	Leaves, open, 3/8 in to 1/2 in long	101.40	91.26	Do.
43	Leaves, simple	7.06	5.66	Do.
44	Leaves, solid, not finished off, 1/8 in long	18.57	16.71	Do.
45	Leaves, solid, not finished off, 1/4 in long	22.52	20.28	Do.
46	Leaves, solid, not finished off, 3/8 in to 1/2 in long	33.80	30.42	Do.
47	Leaves, solid, finished off, 5/8 in to 3/4 in long	67.60	60.84	Per dozen.
52	Pasadas, short, 1 in to 8 in	....	15.76	Per dozen pasadas.
53	Patches, sewed on with single point de ture	336.65	302.99	Per yard.
54	Patches, rectangular, sewed on with blind stitch, up to 1 1/2 in	21.26	19.12	Per dozen inches.
55	Patches, sewed on with solid cord, cutting and basting included	331.24	298.12	Per yard.
61	Rose buds, worm stitch, 4 worms, 1 or 2 colors or tones	50.22	45.18	Per dozen.
66	Shadow stitch, up to 3/8 in wide	326.72	294.06	Per yard.
72	Smocking	1.39	1.24	Per dozen stitches.
73	Snaps, sewing on both sides	33.80	30.42	Per dozen.
78	Tucks, stamped, 1/16 in to 1/4 in wide, up to 6 in long	52.87	47.59	Do.

(e) [Reserved]

(f) *Minimum piece rates for the leather, leather goods and related products industry in Puerto Rico.* The piece rates given below have been adjusted to reflect increases in the minimum hourly wage rate for the "other products and activities" classification of the industry. The minimum hourly wage rate for this classification was increased from $1.425 to $1.575 on May 1, 1974, and to $1.725 effective May 1, 1975, as a result of the Fair Labor Standards Amendments of 1974. Each piece rate below has been increased by the same percent as the hourly rate was increased.

Rate No.	Operations	Effective May 1, 1974 (cents)	Effective May 1, 1975 (cents)	Unit of payment
1	Hand-lacing, single stitch, with plastic lacing material, of leather wallets and leather wallet covers.	1.92	2.10	Per dozen stitches.
2	Hand-lacing, double stitch, with plastic lacing material, of leather wallets and leather wallet covers.	4.73	5.18	Do.
3	Hand-lacing, double stitch, with plastic lacing material, of plastic wallets.	5.87	6.43	Do.

[40 FR 22830, May 27, 1975]

BEST DOCUMENT AVAILABLE

§ 545.10 Piece rates adopted by employers.

(a) Pursuant to the provisions of section 6(a)(2) of the act, in the event that a homeworker performs an operation for which no minimum piece rate has been prescribed by regulation or order of the Administrator or his authorized representative, he shall be paid a piece rate adopted by the prime contractor or manufacturer which shall yield to homeworkers of ordinary skill, under prevalent operating conditions and with equipment ordinarily found in homes, an amount not less than the applicable minimum hourly wage rate established by wage order. This piece rate must be the result of production time studies conducted in Puerto Rico with a representative group of homeworkers. Such piece rate shall be lawful only if it actually satisfies the requirements of this section, and such a rate shall remain in effect only until such time as the Administrator or his authorized representative, by regulation or order, establishes a minimum piece rate for the operations.

(b) Piece rates adopted under this section shall be filed with the Wage and Hour Division in Puerto Rico, accompanied by a record of the time tests showing a full description of the operation tested, the date of the test, measures taken to insure a representative sample of homeworkers, the starting and stopping time of each worker tested together with the number of units produced in that time, the total number of workers tested, the total number of hours worked, and the total number of units produced.

[20 FR 8372, Nov. 9, 1955, as amended at 22 FR 1373, Mar. 6, 1957]

§ 545.11 Penalties.

Section 15 of the act makes it unlawful for any person to violate the provisions of this part and subjects any such person to the penalties provided in section 16 and section 17 of the act.

§ 545.12 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of this part may submit in writing to the Administrator or his authorized representative a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator or his authorized representative believes that reasonable cause for amendment of this part is set forth, the Administrator or his authorized representative will, unless it is impracticable, unnecessary or contrary to the public interest to do so, either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes.

§ 545.100 Enforcement policies.

The following policies will guide the administration and enforcement of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060; 29 U.S.C. 201, et seq.), with respect to piece-rate payments to homeworkers in Puerto Rico:

(a) No employer shall make any deduction from a homeworker's earnings for the value of materials which have been lost, destroyed, or damaged.

(b) Every employer shall make full piece-rate payments for all work which has been satisfactorily performed and returned to the employer, regardless of whether the goods themselves have been soiled or otherwise damaged.

(c) No employer shall be required to pay the homeworker for any work which may have been done on goods which have been lost, destroyed, or for some other reason not returned to the employer.

(d) The employer shall have the right to request the homeworker to redo work which has been improperly executed without having to pay the piece rate more than once.

(e) If the homeworker refuses to redo improperly executed work, the employer shall be required to pay for only such portions of the work as have been satisfactorily performed.

(f) If the homeworker disagrees with the decision of the employer that the work has not been properly executed, the employer shall immediately pay for all work within the lot which has been satisfactorily performed and shall within one week refer the case to the Mayaguez Office of the Wage and Hour Division for a determination as to the payment to be made under the criteria set forth in paragraphs (b) and (e) of this section. In referring the case to that office, the employer (or his authorized representative) shall, either in person or by mail, submit the goods on which he proposes to withhold any part of the piece-rate payments together with an explanation of the amount of wages which he proposes to withhold and the reasons and justification therefor. The Mayaguez Office of the Wage and Hour Division is located in the United States Post Office Building, Post Office Box No. 733. Mayaguez, Puerto Rico. The policies in this section will be enforced with respect to work done on goods distributed to homeworkers on and after December 8, 1947.

[12 FR 7285, Nov. 7, 1947; 20 FR 8815, Dec. 1, 1955, as amended at 36 FR 21815, Nov. 16, 1971]

PART 547—REQUIREMENTS OF A "BONA FIDE THRIFT OR SAVINGS PLAN"

Sec.
547.0 Scope and effect of part.
547.1 Essential requirements for qualifications.
547.2 Disqualifying provisions.
547.3 Petition for amendment of regulations in this part.

Authority: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

Source: 19 FR 4864, Aug. 3, 1954, unless otherwise noted.

§ 547.0 Scope and effect of part.

(a) The regulations in this part set forth the requirements of a "bona fide thrift or savings plan" under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (hereinafter called the act). In determining the total remuneration for employment which section 7(e) of the act requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given period, which are paid pursuant to a bona fide thrift or savings plan meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the act.

(b) Where a thrift or savings plan is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, or with a plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees, contributions made by the employer pursuant to such thrift or savings plan may be excluded from the regular rate if the plan meets the requirements of the regulation in this part and the contributions made for the other purposes may be excluded from the regular rate if they meet the tests set forth in regulations. Part 549, or the tests set forth in Interpretative Bulletin, Part 778 of this chapter, §§ 778.214 and 778.215, as the case may be.

§ 547.1 Essential requirements for qualifications.

(a) A "bona fide thrift or savings plan" for the purpose of section 7(e)(3)(b) of the act is required to meet all the standards set forth in paragraphs (b) through (f) of this section and must not contain the disqualifying provisions set forth in § 547.2.

(b) The thrift or savings plan constitutes a definite program or arrangement in writing, adopted by the employer or by contract as a result of collective bargaining and communicated or made available to the employees, which is established and maintained, in good faith, for the purpose of encouraging voluntary thrift or savings by employees by providing an incentive to employees to accumulate regularly and retain cash savings for a reasonable period of time or to save through the regular purchase of public or private securities.

(c) The plan specifically shall set forth the category or categories of employees participating and the basis of their eligibility. Eligibility may not be based on such factors as hours of work, production, or efficiency of the employees' *Provided, however,* That hours of work may be used to determine eligibility of part-time or casual employees.

(d) The amount any employee may save under the plan shall be specified in the plan or determined in accordance with a definite formula specified in the plan, which formula may be based on one or more factors such as the straight-time earnings or total earnings, base rate of pay, or length of service of the employee.

(e) The employer's total contribution in any year may not exceed 15 percent of the participating employees' total earnings during that year. In addition, the employer's total contribution in any year may not exceed the total amount saved or invested by the participating employees during that year: *Provided, however*, That a plan permitting a greater contribution may be submitted to the Administrator and approved by him as a "bona fide thrift or savings plan" within the meaning of section 7(e)(3)(b) of the act if:

(1) The plan meets all the other standards of this section;

(2) The plan contains none of the disqualifying factors enumerated in § 547.2;

(3) The employer's contribution is based to a substantial degree upon retention of savings; and

(4) The amount of the employer's contribution bears a reasonable relationship to the amount of savings retained and the period of retention.

(f) The employer's contributions shall be apportioned among the individual employees in accordance with a definite formula or method of calculation specified in the plan, which formula or method of calculation is based on the amount saved or the length of time the individual employee retains his savings or investment in the plan: *Provided*, That no employee's share determined in accordance with the plan may be diminished because of any other remuneration received by him.

OMB CONTROL NO.: 1215-0019. (47 FR 145, Jan. 5, 1982)

[19 FR 4864, Aug. 3, 1954, as amended at 47 FR 145, Jan. 5, 1982]

§ 547.2 Disqualifying provisions.

(a) No employee's participation in the plan shall be on other than a voluntary basis.

(b) No employee's wages or salary shall be dependent upon or influenced by the existence of such thrift or savings plan or the employer's contributions thereto.

(c) The amounts any employee may save under the plan, or the amounts paid by the employer under the plan may not be based upon the employee's hours of work, production or efficiency.

§ 547.3 Petition for amendment of regulations in this part.

Any person wishing a revision of any of the terms of the regulations in this part may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If upon the inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations in this part is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes.

PART 548—AUTHORIZATION OF ESTABLISHED BASIC RATES FOR COMPUTING OVERTIME PAY

Subpart A—General Regulations

Sec.
548.1 Scope and effect of regulations.
548.2 General conditions.
548.3 Authorized basic rates.
548.4 Application for authorization of a "basic rate."
548.5 Petition for amendment.

Subpart B—Interpretations

INTRODUCTION

548.100 Introductory statement.

REQUIREMENTS FOR A BASIC RATE

548.200 Requirements.

BEST DOCUMENT AVAILABLE

AUTHORIZED BASIC RATES

Sec.
548.300 Introductory statement.
548.301 Salaried employees.
548.302 Average earnings for period other than a workweek.
548.303 Average earnings for each type of work.
548.304 Excluding value of lunches furnished.
548.305 Excluding certain additions to wages.
548.306 Average earnings for year or quarter year preceding the current quarter.

RATES AUTHORIZED ON APPLICATION

548.400 Procedures.
548.401 Agreement or understanding.
548.402 Applicable overtime provisions.
548.403 Description of method of calculation.
548.404 Kinds of jobs or employees.
548.405 Representative period.

COMPUTATION OF OVERTIME PAY

548.500 Methods of computation.
548.501 Overtime hours based on nonstatutory standards.
548.502 Other payments.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207, unless otherwise noted.

Subpart A—General Regulations

SOURCE: 20 FR 5679, Aug. 6, 1955, unless otherwise noted.

§ 548.1 Scope and effect of regulations.

The regulations in this part set forth the requirements for authorization of established basic rates to be used in the computation of overtime pay in accordance with section 7(g)(3) of the Fair Labor Standards Act of 1938, as amended. Payment of overtime compensation in accordance with other subsections of section 7 of the act is explained in Part 778 of this title (Interpretative Bulletin on Overtime Compensation).

§ 548.2 General conditions.

The requirements of section 7 of the Act with respect to the payment of overtime compensation to an employee for a workweek longer than the applicable number of hours established in section 7(a) of the Act, will be met under the provisions of section 7(g)(3) of the Act by payments which satisfy all the following standards:

(a) Overtime compensation computed in accordance with this part and section 7(g)(3) of the act is paid pursuant to an agreement or understanding arrived at between the employer and the employee or as a result of collective bargaining before performance of the work;

(b) A rate is established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder;

(c) The established basic rate is a specified rate or a rate which can be derived from the application of a specified method of calculation;

(d) The established basic rate is a bona fide rate and is not less than the minimum hourly rate required by applicable law;

(e) The basic rate so established is authorized by § 548.3 or is authorized by the Administrator under § 548.4 as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

(f) Overtime hours are compensated at a rate of not less than one and one-half times such established basic rate;

(g) The hours for which the employee is paid not less than one and one-half times such established basic rate qualify as overtime hours under section 7(e) (5), (6), or (7) of the act;

(h) The number of hours for which the employee is paid not less than one and one-half times such established basic rate equals or exceeds the number of hours worked by him in any workweek in excess of the maximum workweek applicable to such employees under subsection 7(a) of the act;

(i) The employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act are not less than the minimum hourly rate required by this act or other applicable law;

(j) Extra overtime compensation is properly computed and paid on other forms of additional pay which have not been considered in arriving at the basic rate but which are required to be

BEST DOCUMENT AVAILABLE

included in computing the regular rate.

[20 FR 5679, Aug. 6, 1955, as amended at 26 FR 7731, Aug. 18, 1961]

§ 548.3 Authorized basic rates.

A rate which meets all of the conditions of § 548.2 and which in addition satisfies all the conditions set forth in one of the following paragraphs will be regarded as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time and may be used in computing overtime compensation for purposes of section 7(g)(3) of the act, and § 548.2:

(a) A rate per hour which is obtained by dividing a monthly or semi-monthly salary by the number of regular working days in each monthly or semimonthly period and then by the number or hours in the normal or regular workday. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the monthly or semimonthly period for which the salary is paid.

(b) A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act, of the employee for all work performed during the workday or any other longer period not exceeding sixteen calendar days for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the particular period for which the earnings average is computed.

(c) A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act, of the employee for each type of work performed during each workweek, or any other longer period not exceeding sixteen calendar days, for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation, during the particular period for which such average is computed, for all the overtime hours worked by the employee at the type of work for which the rate is obtained.

(d) The rate or rates which may be used under the act to compute overtime compensation of the employee but excluding the cost of meals where the employer customarily furnishes not more than a single meal per day.

(e) The rate or rates (not less than the rates required by section 6 (a) and (b) of the act) which may be used under the act to compute overtime compensation of the employee but excluding additional payments in cash or in kind which, if included in the computation of overtime under the act, would not increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks (in excess of the number of hours applicable under section 7(a) of the act) in the period for which such additional payments are made.

(f) (1) A rate per hour for each workweek equal to the average hourly remuneration of the employee for employment during the annual period or the quarterly period immediately preceding the calendar or fiscal quarter year in which such workweek ends, provided (i) it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during such prior period, including weekly hours of work, work assignments and duties, and the basis of remuneration for employment, were not significantly different from the terms, conditions, and circumstances of employment which affect the employee's regular rates of pay during the current quarter year, or differ only because of some change in basic salary or similar nonfluctuating factor for which suitable adjustments have been made in the calculations to accurately reflect such change and (ii) such average hourly remuneration during the prior period is computed by the method or methods authorized in the following paragraphs.

(2) The average hourly remuneration on which the rate authorized in paragraph (f)(1) of this section is based shall be computed (i) by totaling all remuneration for employment

during the workweeks ending in the prior period (including all earnings at hourly or piece rates, bonuses, commission or other incentive payments, and other forms of remuneration paid to or on behalf of the employee) except overtime premiums and other payments excluded from the regular rate pursuant to provisions of section 7(e) of the act, and (ii) by dividing the amount thus obtained by the number of hours worked in such prior period for which such compensation was paid.

(3) Where it is not practicable for an employer to compute the total remuneration of an employee for employment in the prior period in time to determine obligations under the act for the current quarter year (as where computation of bonus, commission, or incentive payments cannot be made immediately at the end of the period), a one month grace period may be used. If this one month grace period is used, it will be deemed in compliance with paragraph (f)(1) of this section to use the basic rate authorized therein for the quarter commencing one month after the next preceding four-quarter or quarter-year period (whichever length period is adopted as the base period for the rate determination). Once the grace period method of computation is adopted it must be used for each successive quarter.

(52 Stat. 1060, as amended; 29 U.S.C. 201)

[20 FR 5679, Aug. 6, 1955, as amended at 28 FR 11266, Oct. 22, 1963; 31 FR 6769, May 6, 1966]

§ 548.4 Application for authorization of a "basic rate."

(a) Application may be made by any employer or group of employers, for authorization of a basic rate or rates, other than those approved under § 548.3. Application must be made jointly with any collective bargaining representative of employees covered by the application. Application must be made to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210.

(b) Each application shall contain the following:

(1) A statement of the agreement or understanding arrived at between the employer and employee, including the proposed effective date, the term of the agreement or understanding, and a statement of the applicable overtime provisions, and

(2) A description of the basic rate of the method or formula to be used in computing the basic rate for the type of work or position to which it will be applicable, and

(3) A statement of the kinds of jobs or employees covered by the agreement, and

(4) The facts and reasons relied upon to show that the basic rate so established is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time. For such showing, a basic rate shall be deemed "substantially equivalent" to the average hourly earnings of the employee if, during a representative period, the employee's total overtime earnings calculated at the basic rate in accordance with the applicable overtime provisions are substantially equivalent to the amount of such earnings when computed in accordance with section 7(a) of the act on the basis of the employee's average hourly earnings for each workweek, and

(5) Such additional information as the Administrator may require.

(c) The Administrator shall require that notice of the application be given to affected employees in such manner as he deems appropriate. The Administrator shall notify the applicants in writing of his decision as to each application.

(d) In authorizing a basic rate pursuant to this part, the Administrator shall include such conditions as are necessary to insure that the basic rate will be used only so long as it is substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time, and such other conditions as are necessary or appropriate to insure compliance with the provisions of the Act.

(e) The Administrator may at any time, upon his own motion or upon written request of any interested party setting forth reasonable grounds therefor, and after a hearing or other opportunity to interested persons to present their views, amend or revoke any authorization granted under this part.

§ 548.5 Petition for amendment.

Any person wishing a revision of any of the terms of this part may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, after consideration of the petition, the Administrator believes that reasonable cause for amendment of this part is set forth, he shall either schedule a hearing, with due notice to interested parties, or shall make other provisions for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

Subpart B—Interpretations

INTRODUCTION

§ 548.100 Introductory statement.

(a) This subpart contains material explaining and illustrating the terms used in Subpart A of this part which were issued under section 7(g)(3) of the Fair Labor Standards Act. The purpose of section 7(g)(3) of the act, and Subpart A of this part, is to provide an exception from the requirements of computing overtime pay at the regular rate,[1] and to allow, under specific conditions, the use of an established "basic" rate[2] instead. Basic rates are alternatives to the regular rate of pay under section 7(a), and their use is optional. The use of basic rates is principally intended to simplify bookkeeping and computation of overtime pay.

(b) Section 7(g) of the Fair Labor Standards Act provides that an employer will comply with the overtime requirements of the Act if—

> * * * pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection [7](a) —
>
> * * * * *
>
> (3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

[20 FR 5680, Aug. 6, 1955, as amended at 26 FR 7731, Aug. 18, 1961]

REQUIREMENTS FOR A BASIC RATE

§ 548.200 Requirements

The following conditions must be satisfied if a "basic" rate is to be considered proper under section 7(g)(3) and Subpart A of this part.

(a) *Agreement or understanding.* There must be an agreement or understanding establishing a basic rate or rates. This agreement must be arrived at before performance of the work to which it is intended to apply. It may be arrived at directly with the employee or through his representative. The "basic" rate method of computing overtime may be used for as many of the employees in an establishment as the employer chooses, provided he has reached an agreement or understanding with these employees prior to the performance of the work.[3]

---

[1] The regular rate is the average hourly earnings of an employee for a workweek. See §§ 778.107 to 778.122 of this chapter on overtime compensation. Sections 7(g)(1) and 7(g)(2) of the act permit overtime compensation to be computed, under specified conditions, at time and one-half the bona fide hourly or piece rate applicable to the work performed during the overtime hours. See §§ 778.415 to 778.421 of this chapter.

[2] The term "basic" rate as used in this part means the rate authorized under section 7(g)(3) of the Fair Labor Standards Act. Such a rate may be used to compute overtime compensation under the Walsh-Healey Public Contracts Act. (See Rulings and Interpretations No. 3, section 42(e)(1)). However, the term "basic" rate in this part should not be confused with the more general use of the term in the Public Contracts Act to describe all rates which may be used to compute overtime compensation or the use of the term in any other statute.

(b) *The rate.* The established basic rate may be a specified rate or a rate which can be derived from the application of a specified method of calculation. For instance, under certain conditions the Regulations permit the use of the daily average hourly earnings of the employee as a basis for computing daily overtime.[4] Thus, a method rather than a specific rate is authorized. Also, under certain conditions, the cost of a single meal a day furnished to employees may be excluded from the computation of overtime pay.[5] It is the exclusion of the cost of the meals that is authorized and each employee's rate of pay, whatever it may be—an hourly rate, a piece rate or a salary—is his basic rate.

(c) *Minimum wage.* The employee's average hourly earnings for the workweek (exclusive of overtime pay and other pay which may be excluded from the regular rate)[6] and the established basic rate used to compute overtime pay may not be less than the legal minimum.[7]

[20 FR 5680, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956]

AUTHORIZED BASIC RATES

§ 548.300 Introductory statement.

Section 548.3 contains a description of a number of basic rates any one of which, when established by agreement or understanding, is authorized for use without prior specific approval of the Administrator. These basic rates have been found in use in industry and the Administrator has determined that they are subtantially equivalent to the straight-time average hourly earnings of the employee over a representative period of time. The authorized basic rates are described below.

[20 FR 5681, Aug. 6, 1955]

§ 548.301 Salaried employees.

(a) Section 548.3(a) authorizes as an established basic rate: "A rate per hour which is obtained by dividing a monthly or semi-monthly salary by the number of regular working days in each monthly or semi-monthly period and then by the number of hours in the normal or regular workday. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the monthly or semi-monthly period for which the salary is paid."

(b) Section 548.3(a) may be applied to salaried employees paid on a monthly or semi-monthly basis. Under section 7(a) of the act the method of computing the regular rate of pay for an employee who is paid on a monthly or semi-monthly salary basis is to reduce the salary to its weekly equivalent by multiplying the monthly salary by 12 (the number of months) or the semi-monthly salary by 24, and dividing by 52 (the number of weeks). The weekly equivalent is then divided by the number of hours in the week which the salary is intended to compensate.[8] Section 548.3(a) is designed to provide an alternative method of computing the rate for overtime purposes in the case of an employee who is compensated on a monthly or semimonthly salary basis, where this method is found more desirable. This method is applicable only where the salary is paid for a specified number of days per week and a specified number of hours per day normally or regularly worked by the employee. It permits the employer to take into account the variations in the number of regular working days in each pay period. The basic rate authorized by § 548.3(a) is obtained by dividing the monthly or semi-monthly salary by the number of regular working days in the month or half-month, and then by the number of hours of the normal or regular work day.

---

[3] The records which an employer is required to maintain and preserve for an employee compensated for overtime hours on the basis of a basic rate are described in §§ 516.5(b)(5) and 516.21 of this subchapter.

[4] See § 548.302.

[5] See § 548.304.

[6] See §§ 778.200 through 778.225 of this chapter for further discussion of what payments may be excluded.

[7] The legal minimum is the highest rate required by the Fair Labor Standards Act or other Federal, State or local law.

[8] See § 778.113 of this chapter.

Example. An employee is compensated at a semi-monthly salary of $154 for a workweek of 5 days of 8 hours each, Monday through Friday. If a particular half-month begins on Tuesday and ends on the second Tuesday following, there are 11 working days in that half-month. The employee's basic rate would then be computed by dividing the $154 salary by 11 working days of 8 hours each, or 88 hours. The basic rate in this situation would therefore be $1.75 an hour. The basic rate would remain the same regardless of the fact that the employee did not actually work 11 days of 8 hours each because of the occurrence of a holiday, or because the employee took a day off, or because he worked longer than 8 hours on some days during the period, or because he worked fewer than 8 hours on some days, or because he worked more then 11 days. In any of these circumstances the employee's basic rate would still be $1.75 an hour. If in the next semimonthly period there are 10 working days the rate would be computed by dividing the salary of $154 by 80 working hours, or 10 days of 8 hours each. The basic rate would therefore be $1.925 an hour. The rate would remain $1.925 an hour even though the employee did not in fact work ten 8-hour days during the period for the reasons indicated above, or for any other reason.

(c) The overtime compensation for each workweek should be computed at not less than time and one-half the established basic rate applicable in the period during which the overtime is worked. Thus, in the example given above all overtime worked in the first half-month would be computed at not less than time and one-half the basic rate of $1.75 an hour; in the second half-month overtime would be paid for at not less than time and one-half the rate of $1.925 an hour. Where a workweek overlaps two semimonthly periods part of the overtime may be performed in one semimonthly period and part in another semimonthly period with a different basic rate. If it is desired to avoid computing overtime compensation in the same workweek at two different rates, the employment arrangement may provide that overtime compensation for each workweek should be computed at the established basic rate applicable in the half-monthly or monthly period during which the workweek ends.

(Sec. 1, 52 Stat. 1060, as amended, 29 U.S.C. 201, et seq.)

[20 FR 5681, Aug. 6, 1955, as amended at 32 FR 3293, Feb. 25, 1967]

§ 548.302 Average earnings for period other than a workweek.

(a) Section 548.3(b) authorizes as an established basic rate: "A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act, of the employee for all work performed during the workday or any other longer period not exceeding sixteen calendar days for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation for all the overtime hours worked by the employee during the particular period for which the earnings average is computed."

(b) (1) The ordinary method of computing overtime under the act is at the employee's regular rate of pay, obtained by averaging his hourly earnings for each workweek. Section 548.3(b) authorizes overtime to be computed on the basis of the employee's average hourly earnings for a period longer or shorter than a workweek. It permits the payment of overtime compensation on the basis of average hourly earnings for a day, a week, two weeks or any period up to 16 calendar days, if the period is established and agreed to with the employee prior to the performance of the work.[9] The agreement or understanding may contemplate that the basic rate will be the average hourly earnings for a day or a specified number of days within the sixteen day limit, or it may provide that the basic rate will be the average hourly earnings for the period required to complete a specified job or jobs.

---

[9] Averaging over periods in excess of 16 calendar days may in appropriate cases be authorized by the Administrator under § 548.4.

Example 1. An employee is employed on a piece-work basis with overtime after 8 hours a day and on Saturday. Ordinarily his overtime compensation would be computed by averaging his earnings for the entire workweek to arrive at the regular rate of pay and then computing the overtime compensation due. Under this subsection of the regulations the employer and the employee may agree to compute overtime on the basis of the average hourly earnings for each day. Similarly, in a situation involving a bi-weekly or a semi-monthly pay period the employer may find it convenient to compute overtime on the basis of the average hourly earnings for the bi-weekly or semi-monthly period.[10]

Example 2. An employee, who normally would come within the forty hour provision of section 7(a) of the Act, is paid a fixed amount of money for the completion of each job. Each job takes 2 or 3 days to complete. Under the employment agreement, the employee is entitled to time and one-half an authorized basic rate for all hours worked in excess of forty in the workweek. The authorized basic rate is the employee's average hourly earnings for each job. Suppose he completes two jobs in a particular workweek and all his overtime hours are on job No. 2. The employee's average hourly earnings on job No. 2 may be used to compute his overtime pay.

(2) In this connection it should be noted that although the basic rate is obtained by averaging earnings over a period other than a workweek the number of overtime hours under the act must be determined on a workweek basis.

(c) In computing the basic rate under § 548.3(b), the employer may exclude from the computation the payments which he could exclude in computing the "regular" rate of pay.[11]

[20 FR 5681, Aug. 6, 1955, as amended at 26 FR 7731, Aug. 18, 1961]

§ 548.303 Average earnings for each type of work.

(a) Section 548.3(c) authorizes as an established basic rate: "A rate per hour which is obtained by averaging the earnings, exclusive of payments described in paragraphs (1) through (7) of section 7(e) of the act, of the employee for each type of work performed during each workweek, or any other longer period not exceeding sixteen calendar days, for which such average is regularly computed under the agreement or understanding. Such a rate may be used to compute overtime compensation, during the particular period for which such average is computed, for all the overtime hours worked by the employee at the type of work for which the rate is obtained."

(b) Section 548.3(c) differs from § 548.3(b) in this way: Section 548.3(b) provides for the computation of the basic rate on the average of all earnings during the specified period; § 548.3(c) permits the basic rate to be computed on the basis of the earnings for each particular type of work. Thus, if the employee performs different types of work, each involving a different rate of pay such as different piece-rate, job rates, or a combination of these with hourly rates, a separate basic rate may be computed for each type of work and overtime computed on the basis of the rate or rates applicable to the type of work performed during the overtime hours.

Example. An employee who is paid on a weekly basis with overtime after 40 hours works six 8-hour days in a workweek under an agreement or understanding reached pursuant to this subsection. He performs three different types of piecework, each at a different rate of pay. The basic rates to be used for computing overtime in this situation would be arrived at by dividing the earnings for each type of work by the number of hours during which that type of work was performed. There would thus be three different basic rates, one for each type of work. Since the overtime hours used in this illustration occur on the sixth day, the types of work performed on the sixth day would determine the basic rate or rates on which overtime would be computed that week. Thus, if the average hourly earnings for the three types of work are respectively $1.70 an hour in type A, $1.80 an hour in type B, and $2 an hour in type C, and on the sixth day the employee works on type B, his overtime premium for the sixth day would be one-half the basic rate of $1.80 an hour, multiplied by the 8 hours worked on that day.

(Sec. 1, 52 Stat. 1060, as amended, 29 U.S.C. 201, et seq.)

[20 FR 5681, Aug. 6, 1955, as amended at 32 FR 3293, Feb. 25, 1967]

---

[10] See § 548.301 (c) for a discussion of the method of computing overtime for an employee paid on a semi-monthly basis.

[11] See §§ 778.200 through 778.225 of this chapter for an explanation of what payments may be excluded.

§ 548.304 Excluding value of lunches furnished.

(a) Section 548.3(d) authorizes as established basic rates: "The rate or rates which may be used under the Act to compute overtime compensation of the employee but excluding the cost of meals where the employer customarily furnishes not more than a single meal per day."

(b) It is the purpose of § 548.3(d) to permit the employer upon agreement with his employees to omit from the computation of overtime the cost of a free daily lunch or other single daily meal furnished to the employees. The policy behind § 548.3(d) is derived from the Administrator's experience that the amount of additional overtime compensation involved in such cases is trivial and does not justify the bookkeeping required in computing it. Section 548.3(d) is applicable only in cases where the employer customarily furnishes no more than a single meal a day. If more than one meal a day is customarily furnished by the employer all such meals must be taken into account in computing the regular rate of pay and the overtime compensation due.[12] In a situation where the employer furnishes three meals a day to his employees he may not, under § 548.3(d), omit one of the three meals in computing overtime compensation. However, if an employer furnishes a free lunch every day and, in addition, occasionally pays "supper money"[13] when the employees work overtime, the cost of the lunches and the supper money may both be excluded from the overtime rates.

[20 FR 5682, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956]

§ 548.305 Excluding certain additions to wages.

(a) Section 548.3(e) authorizes as established basic rates: "The rate or rates (not less than the rates required by section 6 (a) and (b) of the act) which may be used under the act to compute overtime compensation of the employee but excluding additional payments in cash or in kind which, if included in the computation of overtime under the act, would not increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks (in excess of the number of hours applicable under section 7(a) of the act) in the period for which such additional payments are made."

(b) Section 548.3(e) permits the employer, upon agreement or understanding with the employee, to omit from the computation of overtime certain incidental payments which have a trivial effect on the overtime compensation due. Examples of payments which may be excluded are: modest housing, bonuses or prizes of various sorts, tuition paid by the employer for the employee's attendance at a school, and cash payments or merchandise awards for soliciting or obtaining new business. It may also include such things as payment by the employer of the employee's social security tax.

(c) The exclusion of one or more additional payments under § 548.3(e) must not affect the overtime compensation of the employee by more than 50 cents a week on the average for the overtime weeks.

Example. An employee, who normally would come within the 40-hour provision of section 7(a) of the act, is paid a cost-of-living bonus of $260 each calendar quarter, or $20 per week. The employee works overtime in only 2 weeks in the 13-week period, and in each of these overtime weeks he works 50 hours. He is therefore entitled to $2 as overtime compensation on the bonus for each week in which overtime was worked (i.e., $20 bonus divided by 50 hours equals 40 cents an hour; 10 overtime hours, times one-half, times 40 cents an hour, equals $2 per week). Since the overtime on the bonus is more than 50 cents on the average for the 2 overtime weeks, this cost-of-living bonus would not be excluded from the overtime computation under § 548.3(e).

(d) It is not always necessary to make elaborate computations to determine whether the effect of the exclusion of a bonus or other incidental payment on the employee's total compensation will exceed 50 cents a week on the average. Frequently the addition to regular wages is so small or the number of overtime hours is so limited that under any conceivable circumstances exclusion of the additional payments from the rate used to compute the employee's overtime compensation would not affect the employee's total earnings by more than 50 cents a week. The determination that this is so may be made by inspection of the payroll records or knowledge of the normal working hours.

---

[12] See § 531.37 of this chapter.

[13] See § 778.217(b)(4) of this chapter.

Example. An employer has a policy of giving employees who have a perfect attendance record during a 4-week period a bonus of $10. The employee never works more than 50 hours a week. It is obvious that exclusion of this attendance bonus from the rate of pay used to compute overtime compensation could not affect the employee's total earnings by more than 50 cents a week.[14]

(e) There are many situations in which the employer and employee cannot predict with any degree of certainty the amount of bonus to be paid at the end of the bonus period. They may not be able to anticipate with any degree of certainty the number of hours an employee might work each week during the bonus period. In such situations the employer and employee may agree prior to the performance of the work that a bonus will be disregarded in the computation of overtime pay if the employee's total earnings are not affected by more than 50 cents a week on the average for all overtime weeks during the bonus period. If it turns out at the end of the bonus period that the effect on the employee's total compensation would not exceed 50 cents a week on the average, then additional overtime compensation must be paid on the bonus. (See § 778.209 of this chapter, for an explanation of how to compute overtime on the bonus.)

(f) In order to determine whether the exclusion of a bonus or other incidental payment would affect the total compensation of the employee by not more than 50 cents a week on the average, a comparison is made between his total compensation computed under the employment agreement and his total compensation computed in accordance with the applicable overtime provisions of the act.

Example. An employee, who normally would come within the 40-hour provision of section 7(a) of the act, is paid at piece rates and at one and one-half times the applicable piece rates for work performed during hours in excess of 40 in the workweek. The employee is also paid a bonus, which when apportioned over the bonus period, amounts to $2 a week. He never works more than 50 hours a week. The piece rates could be established as basic rates under the employment agreement and no additional overtime compensation paid on the bonus. The employee's total compensation computed in accordance with the applicable overtime provision of the act, section 7(g)(1)[15] would be affected by not more than 20 cents in any week by not paying overtime compensation on the bonus.[16]

(g) Section 548.3(e) is not applicable to employees employed at subminimum wage rates under learner certificates, or special certificates for handicapped workers, or in the case of employees in Puerto Rico or the Virgin Islands employed at special minimum rates authorized by wage orders issued pursuant to the act.

[31 FR 6769, May 6, 1966]

§ 548.306 Average earnings for year or quarter year preceding the current quarter.

(a) Section 548.3(f)(1) authorizes as an established basic rate:

A rate per hour for each workweek equal to the average hourly remuneration of the employee for employment during the annual period or the quarterly period immediately preceding the calendar or fiscal quarter year in which such workweek ends, provided (i) it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during such prior period, including weekly hours of work, work assignments and duties, and the basis of remuneration for employment, were not significantly different from the terms, conditions, and circumstances of employment which affect the employee's regular rates of pay during the current quarter year, and (ii) such average hourly remuneration during the prior period is computed by the method or methods authorized in the following subparagraphs.

---

[14] For a 50-hour week, an employee's bonus would have to amount to $5 a week to affect his overtime compensation by 50 cents.

[15] Section 7(g)(1) of the act provides that overtime compensation may be paid at one and one-half times the applicable piece rate but extra overtime compensation must be properly computed and paid on additional pay required to be included in computing the regular rate.

[16] Bonus of $2 divided by fifty hours equals 4 cents an hour. Half of this hourly rate multiplied by ten overtime hours equals 20 cents.

(b) There may be circumstances in which it would be impossible or highly impracticable for an employer at the end of a pay period to compute, allocate, and pay to an employee certain kinds of remuneration for employment during that pay period. This may be true in the case of such types of compensation as commissions, recurring bonuses, and other incentive payments which are calculated on work performance over a substantial period of time. Since the total amount of straight-time remuneration is unknown at the time of payment the full regular rate cannot be ascertained and overtime compensation could not be paid immediately except for the provisions of § 548.3(f). In many such situations, the necessity for any subsequent computation and payment of the additional overtime compensation due on these types of remuneration can be avoided and all overtime premium pay due under the Act, including premium pay due on such a commission, bonus or incentive payment, can be paid at the end of the pay period rather than at some later date, if the parties to the employment agreement so desire. This is authorized by § 548.3(f)(1), which provides an alternate method of paying overtime premium pay by permitting an employer, under certain conditions, to use an established basic rate for computing overtime premium pay at the end of each pay period rather than waiting until some later date when the exact amounts of the commission, bonus, or other incentive payment can be ascertained. Such established rate may also be used in other appropriate situations where the parties desire to avoid the necessity of recomputing the regular rate from week to week.

(c) (1) The rate authorized by §§ 548.3(f)(1) is an average hourly rate based on earnings and hours worked during the workweeks ending in a representative period consisting of either the four quarter-years or the last quarter-year immediately preceding the calendar or fiscal quarter-year in which the established rate is to be used. Such a rate may be used only if it is a fact, confirmed by proper records of the employer, that the terms, conditions, and circumstances of employment during this prior period were not significantly different from those affecting the employee's regular rates of pay during the current quarterly period. Significant differences in weekly hours of work, work assignments and duties, the basis of remuneration for employment, or other factors in the employment which could result in substantial differences in regular rates of pay as between the two periods will render the use of an established rate based on such a prior period inappropriate, and its use is not authorized under such circumstances.

(2) However, an increase in the basic salary or other constant factor would not preclude the use of such a rate provided that accurate adjustments are made. For instance, assume that during the previous annual period an employee was compensated on the basis of a weekly salary of $70 plus a commission of 1 percent of sales. If his weekly salary is raised to $80 for the next annual period (assuming he still receives his commission of 1 percent of sales) the annual rate on which the established rate is to be computed must be adjusted by an increase of $520 ($10×52 weeks). For instance, assume the above employee earned a total of $4,244 and worked 2,318 hours during the previous annual period when his salary was $70 per week. Normally his established basic rate would be computed by dividing 2,318 hours into $4,244, thus arriving at a rate of $1.83. However, since the rate must reflect the increase in salary it must be computed by adding the anticipated increase to the pay received during the previous annual period ($4,244+$520=$4,764). The established basic rate would then be $2.05.

(d) Establishment of the rate explained in paragraphs (b) and (c) of this section is authorized under the circumstances there stated, provided it is computed in accordance with § 548.3(f)(2), which prescribes the following method: First, all of the employees' remuneration for employment during the workweeks ending in the representative four-quarter or quarter-year period immediately preceding the current quarter, except overtime premiums and other payments excluded from the regular rate under section 7(e) of the Act, must be totaled. All straight-time earnings at hourly or piece rates or in the form of salary, commissions, bonus or other incentive payments, and board, lodging, or other facilities to the extent required under section 3(m) of the Act and Part 531 of this chapter, together with all other forms of remuneration paid to or on behalf of the employee must be included in the above total. Second, this total sum must be divided by the total number of hours worked during all the workweeks ending in the prior period for which such remuneration was paid. The average hourly rate obtained through this division may be used as the established rate for computing overtime compensation in any workweek, in which the employee works in excess of the applicable maximum standard number of hours, ending in the calendar or fiscal quarter-year period following the four-quarter or quarterly period used for determination of this rate. This is authorized irrespective of any fluctuations of average straight-time hourly earnings above or below such rate from workweek to workweek within the quarter.

(e) As a variant to the method of computation described in paragraph (d) of this section, it is provided in § 548.3(f)(3), with respect to situations where it is not practicable for an employer to compute the total remuneration of an employee for employment in the prior period in time to determine obligations under the Act for the current quarter year, a one-month grace period may be used. This method is authorized, for example, in employment situations where the computation of bonuses, commissions, or other incentive payments cannot be made immediately at the end of the four-quarter or quarterly base period. If this one month grace period is used, it will be deemed in compliance with § 548.3(f)(1) to use the basic rate authorized therein for the quarter commencing one month after the next preceding four-quarter or quarter-year period. To illustrate, suppose an employer and employee agree that the employee will be paid for overtime work at one and one-half times a basic rate computed in accordance with § 548.3(f)(1), but on the pay day for the first workweek ending in the current quarter his records do not show all commissions earned by the employee in the preceding quarter. The employer and employee may therefore elect to use a one month grace period. This would mean that a basic rate for the quarter January 1-March 31, for example, which is derived from the prior four-quarter (January 1-December 31) or quarterly (October 1-December 31) period, as the case may be, would be applied during a quarterly period commencing one month later (February 1-April 30) than the period (January 1-March 31) in which it would otherwise be applicable. The same adjustment would be made in succeeding quarters. Once the grace method of computation is adopted it must be used for each successive quarter.

(f) The established basic rate must be designated and substantiated in the employer's records as required by Part 516 of this chapter, and other requirements of such part with respect to records must be met. An agreement or understanding between the parties to use such rate must be reached prior to the quarter-year period in which the work to which it is applied is performed. The agreement or understanding may be limited to a fixed period or may be a continuing one, but use of the established rate under such an agreement or understanding is not authorized for any period in which terms, conditions, and circumstances of employment become significantly different from those obtaining during the period from which the rate was derived. This method of computation cannot be used if there is any change in the employee's position, method of pay, or amount of salary or if the employee was not employed during the full period used to determine the rate.

(g) To function properly and to provide, over an extended period, overtime premium pay substantially equivalent to the pay the employee would receive if overtime were paid on the true regular rate, the plan must provide that overtime be computed on the established basic rate in every overtime week without regard to the fact that in some weeks the employee receives more premium pay than he would using the true regular rate and in some weeks less. Plans initiated pursuant to this section are based on averages and, if properly applied, will yield substantially the same overtime compensation in a representative period as the employee would have received if it were computed on the true regular rate.

(h) The following examples assume the employee is due overtime premium pay for hours worked over 40 in the workweek.

(1) *Example.* A sales employee whose applicable maximum hours standard is 40 hours enters into an agreement with his employer that he will be paid a salary plus a commission based on a certain percentage of sales. He agrees that this compensation will constitute his total straight-time earnings for all hours worked each week, provided such compensation equals or exceeds the applicable minimum wage.

The employee further agrees that he is to receive overtime premium pay for each workweek on the normal pay day for that week; based each quarter on one-half his established basic rate derived by taking the hourly average of the total straight-time remuneration he received during the workweeks ending in the four-quarter period immediately preceding the current quarter. For example, his established basic rate for each workweek ending in the first quarter of 1964 (January through March) is determined by computing his average hourly rate for employment during all workweeks ending in the four quarter periods of 1963.

Assume the employee worked the following number of hours and received the straight-time pay indicated:

Line No.	Quarters	Pay		Hours worked	
1	1st—1963	$1,074		550	
2	2d—1963	980	$980	480	489
3	3d—1963	1,069	1,069	542	542
4	4th—1963	1,365	1,365	619	619
5	1, 2, 3, 4—1963	4,488		2,200	
6	1st—1964		1,168		531
7	2, 3, 4 (1963) 1 (1964).		4,582		2,181

The employee's basic rate for the first quarter of 1964 (line 6) is determined by the hours worked and pay received in the four previous quarters (lines 1, 2, 3 and 4). Total pay received during that period ($4,488.00, line 5) is divided by the total hours worked (2,200 hours, line 5) to derive the established basic rate ($2.04 per hour). This is the hourly rate on which overtime is computed in each workweek ending in the first quarter of 1964 in which the employee worked in excess of the applicable maximum hours standard. For instance, if in the first week of that quarter the employee worked 47 hours he would be due his guaranteed salary, his commission (at a later date) plus $7.14 as overtime premium pay (7 hours×2.04× 1/2). It does not matter that the employee actually earned and ultimately received $90.71 in salary and commission as his total straight-time pay for that week and that his true hourly rate would be only $1.93 ($90.71÷47 hours). The established basic rate is an average rate and is designed to be used, and must be used, in every overtime week in the quarter for which it was computed, without regard to the employee's true hourly rate in the particular week.

The employee's basic rate for the second quarter of 1964 will be similarly computed at the end of the first quarter of that year by adding together the hours worked and pay received in the second, third, and fourth quarters of 1963 and the first quarter of 1964 (lines 2, 3, 4 and 6) so that the totals now reflect the figures in line 7. The regular rate is again computed by dividing pay received ($4,582.00) by hours worked (2,181) and the new basic rate would be $2.10.

(2) *Example.* Assume that an employee employed under a similar arrangement agrees to receive overtime premium pay for each workweek on the normal pay day, based each quarter on one-half his established basic rate determined by the *quarterly* method rather than by the *annual* method previously discussed. His established basic rate for the first quarter of 1964 would therefore be determined by computing his average hourly rate for the *last quarter* of 1963. To illustrate, if in the latter quarter the employee received $1,156.00 in straight time compensation and worked 561 hours, his basic rate for the first quarter of 1964 would therefore be $2.06 ($1,156.00÷561 hours). During the overtime weeks in this quarter there would be due him, in addition to his straight time compensation, premium pay of $1.03 ($2.06× 1/2) for each hour he works in excess of the applicable maximum hours standard.

As in the previous example the established basic rate must be used in every overtime week in the quarter for which it was computed without regard to the employee's true hourly rate in the particular quarter.

BEST DOCUMENT AVAILABLE

(Sec. 1, 52 Stat. 1060, 1062, as amended, 29 U.S.C. 201, et seq.)

[28 FR 11266, Oct. 22, 1963, as amended at 32 FR 3293, Feb. 26, 1967]

RATES AUTHORIZED ON APPLICATION

§ 548.400 Procedures.

(a) If an employer wants to use an established basic rate other than one of those authorized under § 548.3, he must obtain specific prior approval from the Administrator. For example, if an employer wishes to compute overtime compensation for piece workers for each workweek in a 4-week period at established basic rates which are the straight-time average hourly earnings for each employee for the immediately preceding 4-week period, he should apply to the Administrator for authorization. The application for approval of such a basic rate should be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210. No particular form of application is required but the minimum necessary information outlined in § 548.4 should be included. The application may be made by an employer or a group of employers. If any of the employees covered by the application is represented by a collective bargaining agent, a joint application of the employer and the bargaining agent should be filed. It is not necessary to file separate applications for each employee. One application will cover as many employees as will be paid at the proposed basic rate or rates.

(b) Prior approval of the Administrator is also required if the employer desires to use a basic rate or basic rates which come within the scope of a combination of two or more of the paragraphs in § 548.3 unless the basic rate or rates sought to be adopted meet the requirements of a single paragraph in § 548.3. For instance, an employee may receive free lunches, the cost of which, by agreement or understanding, is not to be included in the rate used to compute overtime compensation.[17] In addition, the employee may receive an attendance bonus which, by agreement or understanding, is to be excluded from the rate used to compute overtime compensation.[18] Since these exclusions involve two paragraphs of § 548.3, prior approval of the Administrator would be necessary unless the exclusion of the cost of the free lunches together with the attendance bonus do not affect the employee's overtime compensation by more than 50 cents a week on the average, in which case the employer and the employee may treat the situation as one falling within a single paragraph, § 548.3(e).

(Sec. 1, 52 Stat. 1060, as amended, 29 U.S.C. 201, et seq.)

[20 FR 5682, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956; 32 FR 3294, Feb. 25, 1967]

§ 548.401 Agreement or understanding.

If the agreement or understanding establishing the basic rate is in writing, whether incorporated in a collective bargaining agreement or not, a copy of the agreement or understanding should be attached to the application. If it is not in writing, however, the application to the Administrator for approval of a basic rate should contain a written statement describing the substance of the agreement or understanding, including the proposed effective date and term of the agreement or understanding. The term of the agreement or understanding may be of definite duration, or may run indefinitely until modified or changed. If an agreement or understanding is modified, a new application for authorization should be made.[19]

[20 FR 5683, Aug. 6, 1955, as amended at 21 FR 338, Jan. 18, 1956]

§ 548.402 Applicable overtime provisions.

The application should also contain a description of the terms of employment relating to overtime so that the Administrator can determine how the established basic rate will be used if it is approved. For instance, if the employees are to be paid time and one-half the basic rate for all hours worked in excess of 35 each workweek,

---

[17] See § 548.304.

[18] See § 548.305.

[19] See § 548.200 for a further explanation of the requirements as to the agreement or understanding establishing the basic rate.

BEST DOCUMENT AVAILABLE

this should be stated in the application. If the employees are to be paid double time for work on Sundays the application should so state.

[20 FR 5683, Aug. 6, 1955]

§ 548.403 Description of method of calculation.

The established basic rate for which approval will be sought will normally be a formula or method of calculation of a rate rather than a specific dollars and cents rates.[20] The application should contain a complete description of the formula or method of calculation of the established basic rate, including any necessary examples which will enable the Administrator to understand how the rate will be computed and applied.

[20 FR 5683, Aug. 6, 1955]

§ 548.404 Kinds of jobs or employees.

The application should describe or otherwise identify the employees to whom the established basic rate will apply. The individual employees need not be identified by name but may be described in terms of job classification, department, location or other appropriate identifying characteristics.

[20 FR 5683, Aug. 6, 1955]

§ 548.405 Representative period.

(a) The application must set forth the facts relied upon to show that the established basic rate is substantially equivalent to the average hourly earnings of the employee exclusive of overtime premiums over a representative period of time.[21] The basic rate will be considered "substantially equivalent" to the average hourly earnings of the employee if, during a representative period, the employee's total overtime earnings calculated at the basic rate in accordance with the applicable overtime provisions are approximately equal to the employee's total overtime earnings computed on his average hourly earnings for each workweek in accordance with section 7(a) of the act.[22]

(b) The length of time constituting a representative period will depend on the factors that cause the employee's average hourly earnings to vary appreciably from week to week. For instance, if the variation in earnings of an employee paid on an incentive basis is due to the difference in availability of work in the slow and busy seasons the period used for comparison of overtime earnings would have to include both a slow and a busy season in order to be representative. Likewise, if a piece-worker's average hourly earnings vary appreciably from week to week because of differences in materials or styles worked on, the period used for purposes of comparison would have to include work on the different materials and styles in order to be representative.

[20 FR 5683, Aug. 6, 1955]

COMPUTATION OF OVERTIME PAY

§ 548.500 Methods of computation.

The methods of computing overtime pay on the basic rates for piece workers, hourly rated employees, and salaried employees are the same as the methods of computing overtime pay at the regular rate.

Example 1. Under an employment agreement the basic rate to be used in computing overtime compensation for a piece worker for hours of work in excess of 8 in each day is the employee's average hourly earnings for all work performed during that day.[23] The employee is entitled to one-half the basic rate for each daily overtime hour in addition to the total piece work earnings for the day.

Example 2. An employee, who normally would come within the forty hour provision of section 7(a) of the Act, has a basic rate which is his monthly salary divided by the number of regular hours of work in the month.[24] If the salary is intended to cover

---

[20] See § 548.200.

[21] See §§ 778.200 through 778.207 of this chapter for further discussion of overtime premiums which may be excluded from the regular rate of pay.

[22] See §§ 778.208 through 778.225 of this chapter for further discussion of the exclusion of vacation pay, holiday pay, discretionary bonuses and other payments from the average hourly earnings which comprise the employee's regular rate of pay.

[23] See § 548.302.

[24] See § 548.301.

BEST DOCUMENT AVAILABLE

straight-time compensation for a forty hour week he would be entitled to overtime for every hour after forty computed on the basis of one and one-half times the established basic rate, in addition to his monthly salary. If the salary is intended to cover a workweek shorter than forty hours, such as thirty-five hours, he would be entitled to additional straight time at the basic rate for the hours between thirty-five and forty and also to overtime at one and one-half time that rate for all hours worked in excess of forty in a week.

[20 FR 5683, Aug. 6, 1955, as amended at 26 FR 7732, Aug. 18, 1961]

§ 548.501 Overtime hours based on nonstatutory standards

Many employees are paid daily overtime pay or Saturday overtime pay or overtime pay on a basis other than the statutory standard of overtime pay required by section 7(a) of the Act. In these cases, the number of hours for which an employee is paid at least one and one-half times an established basic rate must equal or exceed the number of hours worked in excess of the applicable number of hours established in section 7(a) of the Act in the workweek. However, only overtime hours under the employment agreement which also qualify as overtime hours under section 7(e) (5), (6), or (7) of the Act [25] may be offset against the hours of work in excess of the applicable number of hours established in section 7(a) of the Act.

[26 FR 7732, Aug. 18, 1961]

§ 548.502 Other payments.

Extra overtime compensation must be separately computed and paid on payments such as bonuses or shift differentials which are not included in the computation of the established basic rate and which would have been included in the regular rate of pay.[26]

Example 1. An employee is paid on an hourly rate basis plus a production bonus, and also a shift differential of 10 cents for each hour worked on the second shift. The authorized basic rate under the agreement is the employee's daily average hourly earnings, and under the employment agreement he is paid one and one-half times the basic rate for all hours worked in excess of 8 each day. Suppose his production bonus is included in the computation of the basic rate, but the shift differential is not. In addition to overtime compensation computed at the basic rate the employee must be paid an extra 5 cents for each overtime hour worked on the second shift.

Example 2. A piece worker, under his employment agreement, is paid overtime compensation for daily overtime and for hours of work on Saturday based on an authorized basic rate obtained by averaging his piece work earnings for the half-month. In addition, he is paid a monthly cost-of-living bonus which is not included in the computation of the basic rate. It will be necessary for the employer to compute and pay overtime compensation separately on the bonus.[27]

[20 FR 5683, Aug. 6, 1955]

PART 549—REQUIREMENTS OF A "BONA FIDE PROFIT-SHARING PLAN OR TRUST"

Sec.
549.0 Scope and effect of regulations.
549.1 Essential requirements for qualifications.
549.2 Disqualifying provisions.
549.3 Distinction between plan and trust.
549.4 Petition for amendment of regulations.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

SOURCE: 18 FR 3292, June 10, 1953, unless otherwise noted.

§ 549.0 Scope and effect of regulations.

(a) The regulations in this part set forth the requirements of a "bona fide profit-sharing plan or trust" under section 7(e)(3)(b) of the Fair Labor Standards Act of 1938, as amended (hereinafter called the act). In determining the total remuneration for employment which section 7(e) of the act requires to be included in the regular rate at which an employee is employed, it is not necessary to include any sums paid to or on behalf of such employee, in recognition of services performed by him during a given

---

[25] See §§ 778.201 through 778.207 of this chapter.

[26] Unless specifically excluded by agreement or understanding and prior authorization is obtained from the Administrator. See § 548.400(b).

[27] See § 778.209 of this chapter for an explanation of how to compute overtime on the bonus.

BEST DOCUMENT AVAILABLE

period, which are paid pursuant to a bona fide profit-sharing plan or trust meeting the requirements set forth herein. In the formulation of these regulations due regard has been given to the factors and standards set forth in section 7(e)(3)(b) of the act.

(b) The inclusion or exclusion from the regular rate of contributions made by an employer pursuant to any plan or trust for providing old age, retirement, life, accident or health insurance or similar benefits for employees (regardless of whether the plan or trust is financed out of profits) is governed by section 7(e)(4) of the act, the requirements of which are set forth in the Interpretative Bulletin on Overtime Compensation, Part 778, of this chapter, §§ 778.214 and 778.215. However, where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the regulations in this part and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the act may be excluded from the regular rate if they meet the tests set forth in the Interpretative Bulletin, Part 778, of this chapter, §§ 778.214 and 778.215.

§ 549.1 Essential requirements for qualifications.

(a) A bona fide profit-sharing plan or trust for purposes of section 7(e)(3)(b) of the act is required to meet all of the standards set forth in paragraphs (b) through (g) of this section and must not contain any of the disqualifying provisions set forth in § 549.2.

(b) The profit-sharing plan or trust constitutes a definite program or arrangement in writing, communicated or made available to the employees, which is established and maintained in good faith for the purpose of distributing to the employees a share of profits as additional remuneration over and above the wages or salaries paid to employees which wages or salaries are not dependent upon or influenced by the existence of such profit-sharing plan or trust or the amount of the payments made pursuant thereto.

(c) All contributions or allocations by the employer to the fund or trust to be distributed to the employees are:

(1) Derived solely from profits of the employer's business enterprise, establishment or plant as a whole, or an established branch or division of the business or enterprise which is recognized as such for general business purposes and for which profits are separately and regularly calculated in accordance with accepted accounting practice; and

(2) Made periodically, but not more frequently than is customary or consonant with accepted accounting practice to make periodic determinations of profit.

(d) Eligibility to share in profits extends:

(1) At least to all employees who are subject to the minimum wage and overtime provisions of the act, or to all such employees in an established part of the employer's business as described in paragraph (c) of this section: *Provided, however,* That such eligibility may be determined by factors such as length of service or minimum schedule of hours or days of work which are specified in the plan or trust, and further, that eligibility need not extend to officers of the employer; or

(2) To such classifications of employees as the employer may designate with the approval of the Administrator upon a finding, after notice to interested persons, including employee representatives, and an opportunity to present their views either orally or in writing, that it is in accord with the meaning and intent of the provisions of section 7(e)(3)(b) of the act and this part. The Administrator may give such notice by requiring the employer to post a notice approved by the Administrator for a specified period in a place or places where notices to employees are customarily posted or at such other place or places designated by the Administrator, or he may require notice to be given in such other manner as he deems appropriate.

(e) The amounts paid to individual employees are determined in accordance with a definite formula or method of calculation specified in the plan or trust. The formula or method of calculation may be based on any one or more or more of such factors as straight-time earnings, total earnings, base rate of pay of the employee, straight-time hours or total hours worked by employees, or length of service, or distribution may be made on a per capita basis.

(f) An employee's total share determined in accordance with paragraph (e) of this section may not be diminished because of any other remuneration received by him.

(g) Provision is made either for payment to the individual employees of their respective shares of profits within a reasonable period after the determination of the amount of profits to be distributed, or for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares after a stated period of time or upon the occurrence of appropriate contingencies specified in the plan or trust: *Provided, however,* That the right of an employee to receive his share is not made dependent upon his continuing in the employ of the employer after the period for which the determination of profits has been made.

OMB CONTROL No.: 1215-0122.

[18 FR 3292, June 10, 1953, as amended at 47 FR 145, Jan. 5, 1982]

§ 549.2 Disqualifying provisions.

No plan or trust which contains any one of the following provisions shall be deemed to meet the requirements of a bona fide profit-sharing plan or trust under section 7(e)(3)(b) of the act:

(a) If the share of any individual employee is determined in substance on the basis of attendance, quality or quantity of work, rate of production, or efficiency;

(b) If the amount to be paid periodically by the employer into the fund or trust to be distributed to the employees is a fixed sum;

(c) If periodic payments of minimum amounts to the employees are guaranteed by the employer;

(d) If any individual employee's share, by the terms of the plan or trust, is set at a predetermined fixed sum or is so limited as to provide in effect for the payment of a fixed sum, or is limited to or set at a predetermined specified rate per hour or other unit of work or worktime;

(e) If the employer's contributions or allocations to the fund or trust to be distributed to the employees are based on factors other than profits such as hours of work, production, efficiency, sales or savings in cost.

§ 549.3 Distinction between plan and trust.

As used in this part:

(a) "Profit-sharing plan" means any such program or arrangement as qualifies hereunder which provides for the distribution by the employer to his employees of their respective shares of profits;

(b) "Profit-sharing trust" means any such program or arrangement as qualifies under this part which provides for the irrevocable deposit by the employer of his employees' distributive shares of profits with a trustee for deferred distribution to such employees of their respective shares.

§ 549.4 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations in this part may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations in this part is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views in support of or in opposition to the proposed changes.

PART 550—DEFINING AND DELIMITING THE TERM "TALENT FEES"

Sec.
550.1 "Talent fees" as used in section 7(e)(3)(c) of the Fair Labor Standards Act, as amended.
550.2 Definitions.
550.3 Petition for amendment of regulations.

AUTHORITY: Sec. 7, 52 Stat. 1063, as amended; 29 U.S.C. 207.

SOURCE: 15 FR 402, Jan. 25, 1950, unless otherwise noted.

§ 550.1 "Talent fees" as used in section 7(e)(3)(c) of the Fair Labor Standards Act, as amended.

The term "talent fees" in section 7(e)(3)(c) of the act shall mean extra payments made to performers, including announcers on radio and television programs, where the payment is made:

(a) To an employee having regular duties as a staff performer (including announcers), as an extra payment for services as a performer on a particular commercial program or a particular series of commercial programs (including commercial spot announcements) or for special services as a performer on a particular sustaining program or a particular series of sustaining programs;

(b) In pursuance of an applicable employment agreement or understanding or an applicable collective bargaining agreement in a specific amount agreed upon in advance of the performance of the services or special services for which the extra payment is made: *Provided, however,* That where services described in paragraph (a) of this section are performed on a program falling outside of the regular workday or workweek as established and scheduled in good faith in accordance with the provisions of the applicable employment agreement, the Administrator will not regard the act as requiring additional compensation as a result of the time worked on the program if the parties agree in advance of such program that a special payment made therefor shall include any increased statutory compensation attributable to the additional worktime thereon and if such special payment, when made, is actually sufficient in amount to include the statutory straight time and overtime compensation (computed without regard to talent fees) for the additional time worked in the workweek resulting from the performer's services on such program.

[15 FR 402, Jan. 25, 1950, as amended at 18 FR 5069, Aug. 25, 1953]

§ 550.2 Definitions.

As used in the regulations in this part:

(a) The term "extra payment" shall mean a payment, in a specific amount, made in addition to the straight-time and overtime compensation which would be due the performer under the agreement applicable to his employment and under the act if the time spent in performing the services or special services referred to in paragraph (a) of § 550.1 had been devoted exclusively to duties as a staff performer; but shall not include any payment any part of which is credited or offset against any remuneration otherwise payable to the performer under any contract or statutory provision;

(b) The term "performer" shall mean a person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as technicians such as engineers, electricians and stage hands;

(c) The term "special services" shall mean services beyond the scope of a performer's regular or ordinary duties as a staff performer under the agreement applicable to the employment.

§ 550.3 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provisions for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed change.

PART 551—LOCAL DELIVERY DRIVERS AND HELPERS; WAGE PAYMENT PLANS

Sec.
551.1 Statutory provision.
551.2 Findings authorized by this part.
551.3 Petition for a finding.
551.4 Requirements for a petition.
551.5 Information to be submitted.
551.6 Action on petition.
551.7 Finding.
551.8 Definitions.
551.9 Recordkeeping requirements.

AUTHORITY: Sec. 9, 75 Stat. 74; 29 U.S.C. 213(b).

SOURCE: 30 FR 8585, July 7, 1965, unless otherwise noted.

§ 551.1 Statutory provision.

The following provision for exemption from the overtime pay provision is contained in section 13(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213(b)):

> (b) The provisions of section 7 shall not apply with respect to—
>
> * * * * *
>
> (11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a).

Under this provision, an employee employed and compensated as described in the quoted paragraph (11) may be employed without payment of overtime compensation for a workweek longer than the maximum workweek applicable to him under section 7(a) of the Act, but only if it is established by a finding of the Secretary that the employee is compensated for his employment as a driver or driver's helper making local deliveries on the basis of trip rates or other delivery payment plan that has the general purpose and effect stated in section 13(b)(11). Such a finding is prescribed by the statute as one of the "explicit prerequisites to exemption". (See Arnold v. Kanowsky, 361 U.S. 388, 392.)

§ 551.2 Findings authorized by this part.

(a) The Administrator, pursuant to the authority vested in him by the Secretary of Labor, will make and apply findings under section 13(b)(11) of the Act as provided in this part. Such findings shall be made only upon petitions meeting the requirements of this part, and only as authorized in this section.

(b) For the purpose of establishing whether a wage payment plan has the purpose and effect required by section 13(b)(11) for an exemption from the overtime provisions of the Act, the Administrator shall have authority, upon a proper showing and in accordance with the provisions of this part, to make a finding as to the general purpose and effect of any specific plan of compensation on the basis of trip rates or other delivery payment plan, with respect to the reduction of the length of the workweeks worked by the employees of any specific employer who are compensated in accordance with such plan for their employment by such employer as drivers or drivers' helpers making local deliveries.

(c) Any finding made as to the purpose and effect of such a wage payment plan pursuant to a petition therefor will be based upon a consideration of all relevant facts shown or represented to exist with respect to such plan that are made available to the Administrator. A finding that such plan has the general effect of reducing the hours worked by drivers or drivers' helpers compensated thereunder to, or below, the maximum workweek applicable to them under section 7(a) of the Act is not authorized under this part unless the Administrator finds that during the most recently completed representative period of one year (based on the experience of the employer in question, or if such employer has not previously used such plan, on the experience of another employer using such plan under substantially the same conditions, all as defined in § 551.8(g)(1)), the average weekly hours, taken in the aggregate, of all full-time employees covered by the plan are not in excess of the maximum workweek applicable to such employees under section 7(a), or unless the Administrator makes an interim finding with respect to such plan that, notwithstanding a lack of experience under it for a representative period of 1 year, its provisions and manner of operation, together with the other available information concerning the plan, indicate clearly that by the end of such first representative year the effect of the plan will have been to reduce the average weekly hours worked by the employees covered by the plan in such first year of operation to, or below, such maximum applicable workweek.

§ 551.3 Petition for a finding.

Any employer desiring to establish an exemption from the overtime pay requirements of the Act with respect to employees whose employment and compensation may be considered to qualify therefor under section 13(b)(11) may petition the Administrator, in writing, for a finding under such section and this part. If the wage payment plan with respect to which the finding is sought has been the subject of collective bargaining with representatives of employees covered by the plan, the employer shall provide timely notice of such petition, in writing, to the authorized representatives or representatives of such employees and shall submit a copy of such notice to the Administrator.

§ 551.4 Requirements for petition.

A petition for a finding under section 13(b)(11) of the Act and this part shall include in such detail as the Administrator may deem necessary for evaluation under the standards provided by the statute and this part, all the information required by § 551.5. Such information may be presented in any form convenient to the petitioner; no particular form is prescribed for the petition. The petition shall also include, by attachment, a copy of any collective bargaining agreement or other document governing the method of payment for the work of employees covered by the wage payment plan with respect to which a finding is requested. The petition, together with any such documents, shall be filed with the Administrator, Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210.

§ 551.5 Information to be submitted.

Every petition filed under §§ 551.3 and 551.4 shall contain the following information:

(a) A full statement of the facts relied upon by the petitioner to establish, under the applicable definitions in § 551.8, that the wage payment plan submitted for consideration (1) applies to employees employed (i) as drivers or drivers' helpers, or both, (ii) in "making local deliveries" and (2) determines, "on the basis of trip rates or other delivery payment plan", the compensation which such employees receive for such employment; and

(b) A complete description of the wage payment plan and full information concerning its application showing, among other things, (1) the method of compensation which it provides and the types of payments made to employees covered by the plan, together with such information as may be necessary to show how these payments are computed and how and to what extent they are actually used in determining the total compensation received by employees covered by the plan, (2) a full description of all duties performed by the employees compensated under the plan, including information as to the types of goods delivered, their points of origin and destination and the purposes for and geographical area within which they are transported by the employees, the relationship of the employer to the consignor and consignee, and the numbers, (minimum, maximum, and average or typical) of round trips made by such employees in transporting such goods during the workday and of deliveries made during each such trip, and (3) other relevant information concerning the employees compensated under the plan including the total number of such employees employed full-time as drivers or drivers' helpers making local deliveries under the provisions of the plan during the most recent representative annual period as defined in § 551.8(g)(1), the weekly hours worked and the average workweek of such employees during such period and, if there are any significant variations in the number of such employees so employed in the particular workweeks within the period, a full statement of the facts concerning such variations, information as to any workweeks in which any employees compensated under the plan devote less than eighty percent of their worktime to duties as drivers or drivers' helpers making local deliveries; and

(c) A statement of the facts and reasons based on the history and application of the plan which are relied upon to support a finding that the plan has the general purpose and effect of reducing the hours worked by drivers or drivers' helpers covered by its provisions to, or below, the statutory maximum workweek applicable to them under the Act.

§ 551.6 Action on petition.

(a) Upon the filing of a petition as provided in this part, the Administrator will give consideration thereto, and make any further inquiry into the facts that he may deem necessary. The Administrator may require, before taking further action thereof, that notice of the petition be given to affected employees in such manner as he shall determine to be appropriate to afford them an opportunity to submit any facts or reasons supporting or opposing the finding prayed for in the petition. If the Administrator determines that the petition fails to satisfy any of the requirements of this part, he shall deny the request for a finding or, in his discretion, advise petitioners that further consideration will be given to the submission if the deficiencies are remedied within a specified time. No further consideration will be given, however, to a request for a finding if the Administrator determines that the factual situation as described in the petition is not one in which authority to make the finding is provided by section 13(b)(11) and this part.

(b) If the Administrator determines that a petition meets all requirements of this part and if he is satisfied from consideration of all relevant facts and information available to him that the wage payment plan submitted has, within the meaning of section 13(b)(11) of the Act and this part, the general purpose and effect with respect to drivers or drivers' helpers making local deliveries, who are employed pursuant to its provisions on the basis of trip rates or other delivery payment plan, of reducing the hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a) of the Act, the Administrator will make an appropriate finding to this effect, and notify the petitioner; otherwise the request for such a finding will be denied.

§ 551.7 Finding.

(a) A finding by the Administrator under paragraph (b) of § 551.6 that a wage payment plan has the purpose and effect required for exemption of employees under section 13(b)(11) and this part shall be effective in accordance with its terms upon notification to petitioners as provided in § 551.6(b). The finding shall include such terms and conditions and such limitations with respect to its application as the Administrator shall deem necessary to ensure that no exemption will be based thereon in the event of any significant change in any of the essential supporting facts.

(b) A finding made pursuant to this part may be amended or revoked by the Administrator at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor. Before taking such action, the Administrator shall afford opportunity to interested persons to present their views and shall give consideration to any relevant information that they may present.

§ 551.8 Definitions.

As used in this part—

(a) "Secretary" means the Secretary of Labor.

(b) "Administrator" means the Administrator of the Wage and Hour Division, United States Department of Labor.

(c) "Finding" means a finding made pursuant to section 13(b)(11) of the Fair Labor Standards Act as provided in this part.

(d) "Making local deliveries" includes the activities customarily and regularly performed in the physical transfer, to customers of a business establishment situated within the rural or urban community or metropolitan area in which the establishment is located, of goods sold or otherwise disposed of to such local customers by such establishment. Included are activities performed by the driver or driver's helpers as an incident to or in conjunction with making such deliveries, such as picking up and returning the delivery vehicle at the beginning and end of the workday, cleaning the vehicle, checking it to see that it is in operating condition, loading and unloading or assisting in loading or unloading the goods, and picking up empty containers or other goods from customers for return to the establishment. Not included in the making of local deliveries are such transportation as the carriage of passengers; the transportation of any load of goods that would normally require a round trip longer than a single workday for delivery and return to the starting point; any movement of goods which does not accomplish a transfer of possession from one person to another; transportation of goods as a part of a process of production; and transportation of goods within a local community or metropolitan area as an integral part of a carriage of such goods from a point outside such community or area to a destination within it, rather than as a part of the activities customarily performed in making local deliveries, as defined in this section, in the same manner as deliveries of goods held locally for local disposition.

(e) "Employee employed as a driver or driver's helper making local deliveries" includes any employee who is employed in any workweek—

(1) To drive a delivery vehicle used in making local deliveries, or

(2) To assist the driver of such a vehicle in making such deliveries, being required to ride on the vehicle to perform such work,

and whose work in making local deliveries, as defined in paragraph (d) of this section, accounts for at least 80 percent of his hours of work in such workweek. In making and applying any finding as provided in this part, no employee shall be considered to be employed as a driver or driver's helper making local deliveries in any workweek when more than 20 percent of his hours of work results from the performance of duties other than those included in making such local deliveries.

(f) A plan of compensation "on the basis of trip rates or other delivery payment plan" means any plan whereby employees employed as drivers or drivers' helpers making local deliveries are compensated for their employment on a basis such that the amount of payment which they receive is governed in substantial part by a system of wage payments based on units of work measurement such as numbers of trips taken, miles driven, stops made, or units of goods delivered (but not including any plan based solely on the number of hours worked) so that there is a substantial inducement to employees to minimize the number of hours worked.

(g) For purposes of determining whether and to what extent a plan of compensation on the basis of trip rates or other delivery payment plan has the effect of reducing the weekly hours worked by employees employed by an employer as drivers or drivers' helpers making local deliveries pursuant to such plan—

(1) The "most recently completed representative period of one year" (§ 551.2(c)) or "most recent representative annual period" (§ 551.5(b)(3)) shall mean a one-year period within which such employees were so employed on a regular full-time basis by such employer (or, if such employer has not previously used such plan, by another employer using the plan under substantially the same conditions, which period shall include a calendar or fiscal quarter-year ending not

more than four months prior to the date as of which the effect of such plan is to be considered, together with the three quarter-year periods immediately preceding such recently completed quarter-year; and

(2) The "average weekly hours" or "average workweek" of the full-time employees so employed during such annual period shall mean the number of hours obtained by the following computation: (i) All the hours worked during such annual period by all the full-time employees regularly employed under the plan shall be totaled; (ii) the number of workweeks worked by each such employee during such annual period under such plan shall be computed, and the totals added together; and (iii) the average weekly hours, taken in the aggregate, of all such employees shall be computed by dividing the sum resulting from computation (i) by the sum resulting from computation (ii).

§ 551.9 Recordkeeping requirements.

The records which must be kept and the computations which must be made with respect to employees for whom the overtime pay exemption under section 13(b)(11) is taken are specified in § 516.15 of this chapter.

[35 FR 17841, Nov. 20, 1970]

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

Subpart A—General Regulations

Sec.
552.1 Terms used in regulations.
552.2 Purpose and scope.
552.3 Domestic service employment.
552.4 Babysitting services.
552.5 Casual basis.
552.6 Companionship services for the aged or infirm.
552.7 Petition for amendment of regulations.

Subpart B—Interpretations

552.99 Basis for coverage of domestic service employees.
552.100 Application of minimum wage and overtime provisions.
552.101 Domestic service employment.
552.102 Live-in domestic service employees.
Sec.
552.103 Babysitting services in general.
552.104 Babysitting services performed on a casual basis.
552.105 Individuals performing babysitting services in their own homes.
552.106 Companionship services for the aged or infirm.
552.107 Yard maintenance workers.
552.108 Child labor provisions.
552.109 Third party employment.
552.110 Recordkeeping requirements.

AUTHORITY: Sec. 13(a)(15) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15)), 88 Stat. 62; sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 76), unless otherwise noted.

SOURCE: 40 FR 7405, Feb. 20, 1975, unless otherwise noted.

Subpart A—General Regulations

§ 552.1 Terms used in regulations.

(a) "Administrator" means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or the Administrator's authorized representative.

(b) "Act" means the Fair Labor Standards Act of 1938, as amended.

§ 552.2 Purpose and scope.

(a) This part provides necessary rules for the application of the Act to domestic service employment in accordance with the following amendments made by the Fair Labor Standards Amendments of 1974, 88 Stat. 55, et seq.

(b) Section 2(a) of the Act finds that the "employment of persons in domestic service in households affects commerce." Section 6(f) extends the minimum wage protection under section 6(b) to employees employed as domestic service employees under either of the following circumstances: (1) If the employee's compensation for such services from his employer would constitute wages under section 209(g) of Title II of the Social Security Act, that is, if the compensation paid in cash during a calendar year totaled $50 or more or (2) if the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.

BEST DOCUMENT AVAILABLE

Section 7(1) extends generally the protection of the overtime provisions of section 7(a) to such domestic service employees. Section 13(a)(15) provides both a minimum wage and overtime exemption for "employees employed on a casual basis in domestic service employment to provide babysitting services" and for domestic service employees employed" to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." Section 13(b)(21) provides an overtime exemption for domestic service employees who reside in the household in which they are employed.

(c) The definitions required by section 13(a)(15) are contained in §§ 552.3, 552.4, 552.5 and 552.6.

(Sec. 29(b), 88 Stat. 76; (29 U.S.C. 206(f)); Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913), and Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[40 FR 7405, Feb. 20, 1975, as amended at 44 FR 37221, June 26, 1979]

§ 552.3 Domestic service employment.

As used in section 13(a)(15) of the Act, the term "domestic service employment" refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

§ 552.4 Babysitting services.

As used in section 13(a)(15) of the Act, the term "babysitting services" shall mean the custodial care and protection, during any part of the 24-hour day, of infants or children in or about the private home in which the infants or young children reside. The term "babysitting services" does not include services relating to the care and protection of infants or children which are performed by trained personnel, such as registered, vocational, or practical nurses. While such trained personnel do not qualify as babysitters, this fact does not remove them from the category of a covered domestic service employee when employed in or about a private household.

§ 552.5 Casual basis.

As used in section 13(a)(15) of the Act, the term "casual basis", when applied to babysitting services, shall mean employment which is irregular or intermittent, and which is not performed by an individual whose vocation is babysitting. Casual babysitting services may include the performance of some household work not related to caring for the children: *Provided, however,* That such work is incidental, i.e., does not exceed 20 percent of the total hours worked on the particular babysitting assignment.

§ 552.6 Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term "companionship services" shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however,* That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

§ 552.7 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of the foregoing regulations may submit in writing to the Administrator a petition setting forth the changes desired, the reasons for proposing the specified changes, and his or her interest in the matter. No particular form of petition is required. If, upon inspection of the petition, the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes.

Subpart B—Interpretations

§ 552.99 Basis for coverage of domestic service employees.

Congress in section 2(a) of the Act specifically found that the employment of persons in domestic service in households affects commerce. In the legislative history it was pointed out that employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce (S. Rep. 93-690, pp. 21-22). The Senate Committee on Labor and Public Welfare "took note of the expanded use of the interstate commerce clause by the Supreme Court in numerous recent cases (particularly "Katzenbach v. McClung", 379 U.S. 294 (1964))," and concluded "that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act" (S. Rep. 93-690, pp. 21-22).

§ 552.100 Application of minimum wage and overtime provisions.

(a) (1) Domestic service employees must receive for employment in any household a minimum wage of not less than—

$1.90 an hour beginning May 1, 1974, $2.00 an hour beginning January 1, 1975, $2.20 an hour beginning January 1, 1976, $2.30 an hour beginning January 1, 1977, $2.65 an hour beginning January 1, 1978, $2.90 an hour beginning January 1, 1979, $3.10 an hour beginning January 1, 1980, and $3.35 an hour after December 31, 1980.

(2) In addition, domestic service employees who work more than 40 hours in any one workweek for the same employer must be paid overtime compensation at a rate not less than one and one-half times the employee's regular rate of pay for such excess hours, unless the employee is one who resides in the employer's household. In the case of employees who reside in the household where they are employed, section 13(b)(21) of the Act provides an overtime, but not a minimum wage, exemption. See § 552.102.

(b) In meeting the wage responsibilities imposed by the Act, employers may take appropriate credit for the reasonable cost or fair value, as determined by the Administrator, of food, lodging and other facilities customarily furnished to the employee by the employer such as drugs, cosmetics, drycleaning, etc. See S. Rep. 93-690, p. 19, and section 3(m) of the Act. Credit may be taken for the reasonable cost or fair value of these facilities only when the employee's acceptance of them is voluntary and uncoerced. See regulations, Part 531. Where uniforms are required by the employer, the cost of the uniforms and their care may not be included in such credit.

(c) For enforcement purposes, the Administrator will accept a credit taken by the employer of $0.75 for breakfast (if furnished, $1.00 for lunch (if furnished), and $1.25 for dinner (if furnished), which meal credits do not exceed $3.00 a day. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing meals, as determined in accordance with Part 531 of this chapter, if such cost or fair value is different from the meal credits specified above: *Provided, however,* That employers keep, maintain and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures.

(d) In the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of $15 a week. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging, as determined in accordance with Part 531 of this chapter, if such cost or fair value is different from the amount specified above, provided however, that employers keep, maintain, and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures. In determining reasonable cost or fair value, the regulations and rulings in 29 CFR 531 are applicable.

(Sec. 29(b), 88 Stat. 76; (29 U.S.C. 206(f)); Secretary's Order No. 16-75, dated Nov. 25, 1975 (40 FR 55913), and Employment Standards Order No. 76-2, dated Feb. 23, 1976 (41 FR 9016))

[40 FR 7405, Feb. 20, 1975, as amended at 44 FR 6716, Feb. 2, 1979]

§ 552.101 Domestic service employment.

(a) The definition of "domestic service employment" contained in § 552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1027(j)) and from "the generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate and distinct dwelling maintained by an individual or a family in an apartment house, condominium or hotel may constitute a private home.

(b) Employees employed in dwelling places which are primarily rooming or boarding houses are not considered domestic service employees. The places where they work are not private homes but commercial or business establishments. Likewise, employees employed in connection with a business or professional service which is conducted in a home (such as a real estate, doctor's, dentist's or lawyer's office) are not domestic service employees.

(c) In determining the total hours worked, the employer must include all time the employee is required to be on the premises or on duty and all time the employee is suffered or permitted to work. Special rules for live-in domestic service employees are set forth in § 552.102.

§ 552.102 Live-in domestic service employees.

(a) Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act's overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked. See regulations Part 785, § 785.23.

(b) Where there is a reasonable agreement, as indicated in (a) above, it may be used to establish the employee's hours of work in lieu of maintaining precise records of the hours actually worked. The employer shall keep a copy of the agreement and indicate that the employee's work time generally coincides with the agreement. If it is found by the parties that there is a significant deviation from the initial agreement, a separate record should be kept for that period or a new agreement should be reached that reflects the actual facts.

§ 552.103 Babysitting services in general.

The term "babysitting services" is defined in § 552.4. Babysitting is a form of domestic service, and babysitters other than those working on a casual basis are entitled to the same benefits under the Act as other domestic service employees.

§ 552.104 Babysitting services performed on a casual basis.

(a) Employees performing babysitting services on a casual basis, as defined in § 552.5 are excluded from the minimum wage and overtime provisions of the Act. The rationale for this exclusion is that such persons are usually not dependent upon the income from rendering such services for their livelihood. Such services are often provided by (1) teenagers during nonschool hours or for a short period after completing high school but prior to entering other employment as a vocation, or (2) older persons whose main source of livelihood is from other means.

(b) Employment in babysitting services would usually be on a "casual basis", whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a "casual basis" if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a "casual basis" (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vacations are not domestic service who accompany families for a vaction period to take care of the children if the duration of such employment does not exceed 6 weeks.

(c) If the individual performing babysitting services on a "casual basis" devotes more than 20 percent of his or her time to household work during a babysitting assignment, the exemption for "babysitting services on a casual basis" does not apply during that assignment and the individual must be paid in accordance with the Act's minimum wage and overtime requirements. This does not affect the application of the exemption for previous or subsequent babysitting assignments where the 20 percent tolerance is not exceeded.

(d) Individuals who engage in babysitting as a full-time occupation are not employed on a "casual basis."

§ 552.105 Individuals performing babysitting services in their own homes.

(a) It is clear from the legislative history that the Act's new coverage of domestic service employees is limited to those persons who perform such services in or about the private household of the employer. Accordingly, if such services are performed away from the employer's permanent, or temporary household there is no coverage under sections 6(f) and 7(l) of the Act. A typical example would be an individual who cares for the children of others in her own home. This type of operation, however, could, depending on the particular facts, qualify as a preschool or day care center and thus be covered under section 3(s)(4) of the Act in which case the person providing the service would be required to comply with the applicable provisions of the Act.

(b) An individual in a local neighborhood who takes four or five children into his or her home, which is operated as a day care home, and who does not have more than one employee or whose only employees are members of that individual's immediate family is not covered by the Fair Labor Standards Act.

§ 552.106 Companionship services for the aged or infirm.

The term "companionship services for the aged or infirm" is defined in § 552.6. Persons who provide care and protection for babies and young children, who are not physically or mentally infirm, are considered babysitters, not companions. The companion must perform the services with respect to the aged or infirm persons and not generally to other persons. The "casual" limitation does not apply to companion services.

§ 552.107 Yard maintenance workers.

Persons who mow lawns and perform other yard work in a neighborhood community generally provide their own equipment, set their own work schedule and occasionally hire other individuals. Such persons will be recognized as independent contractors who are not covered by the Act as domestic service employees. On the other hand, gardeners and yardmen employed primarily by one household are not usually independent contractors.

§ 552.108 Child labor provisions.

Congress made no change in section 12 as regards domestic service employees. Accordingly, the child labor provisions of the Act do not apply unless the underaged minor (a) is individually engaged in commerce or in the production of goods for commerce, or (b) is employed by an enterprise meeting the coverage tests of sections 3(r) and 3(s)(1) of the Act, or (c) is employed in or about a home where work in the production of goods for commerce is performed.

§ 552.109 Third party employment.

(a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.

(b) Employees who are engaged in providing babysitting services and who are employed by an employer or agency other than the family or household using their services are not employed on a "casual basis" for purposes of the section 13(a)(15) exemption. Such employees are engaged in this occupation as a vocation.

(c) Live-in domestic service employees who are employed by an employer or agency other than the family or household using their services are exempt from the Act's overtime requirements by virtue of section 13(b)(21). This exemption, however, will not apply where the employee works only temporarily for any one family or household, since that employee would not be "residing" on the premises of such family or household.

§ 552.110 Recordkeeping requirements.

(a) The general recordkeeping regulations are found in Part 516 of this chapter and they require that every employer having covered domestic service employees shall keep records which show for each such employee (1) name in full, (2) social security number, (3) address in full, including zip code, (4) total hours worked each week by the employee for the employer, (5) total cash wages paid each week to the employee by the employer, (6) weekly sums claimed by the employer for board, lodging or other facilities, and (7) extra pay for weekly hours worked in excess of 40 by the employee for the employer. No particular form of records is required, so long as the above information is recorded and the record is maintained and preserved for a period of 3 years.

(b) In the case of an employee who resides on the premises, records of the actual hours worked are not required. Instead, the employer may maintain a copy of the agreement referred to in § 552.102. The more limited recordkeeping requirement provided by this subsection does not apply to third party employers. No records are required for casual babysitters.

(c) Where a domestic service employee works on a fixed schedule, the employer may use a schedule of daily and weekly hours that the employee normally works and either the employer or the employee may (1) indicate by check marks, statement or other method that such hours were actually worked, and (2) when more or less than the scheduled hours are worked, show the exact number of hours worked.

(d) The employer may require the domestic service employee to record the hours worked and submit such record to the employer.

PART 553—EMPLOYEES OF PUBLIC AGENCIES ENGAGED IN FIRE PROTECTION OR LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

Sec.
553.1 Statutory provisions.
553.2 Purpose and scope.

Employees Engaged in Fire Protection and Law Enforcement Activities (Including Security Personnel in Correctional Institutions)

553.3 Fire protection activities.
553.4 Law enforcement activities.
553.5 20 percent limitation on nonexempt work.
553.6 Public agency employees engaged in both fire protection and law enforcement activities.
553.7 Employees attending training facilities.
553.8 Ambulance and rescue service employees.
553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.
553.10 Mutual aid.
553.11 Fire protection and law enforcement volunteers.

Rules for Determining the Tour of Duty, Work Period and Compensable Hours of Work

553.12 General statement.
553.13 Tour of duty.
553.14 General rules for determining compensable hours of work.
553.15 Sleeping and meal time as compensable hours of work.
553.16 Work period.
553.17 Early relief.
553.18 Trading time.
553.19 Time off for excess hours or so-called "comp time."
553.20 The "regular rate".
553.21 Records to be kept.

Authority: Secs. 1-19, 52 Stat. 1060, as amended; 88 Stat. 60 (29 U.S.C. 201-219).

Source: 39 FR 44142, Dec. 20, 1974, unless otherwise noted.

§ 553.1 Statutory provisions.

(a) In extending coverage to certain public agency employees, the Fair Labor Standards Act (hereafter the Act), by virtue of section 13(b)(20), provided a complete overtime exemption for any employee of a public agency who is engaged in fire protection or law enforcement activities (including security personnel in correctional institutions) during the period between the effective date of the 1974 Amendments (May 1, 1974) to and through December 31, 1974. Beginning January 1, 1975, however, this complete overtime exemption may be claimed only with respect to "any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than five employees in fire protection or law enforcement activities as the case may be."

(b) Beginning January 1, 1975, public agencies not qualifying for the complete overtime exemption provided in section 13(b)(20) will be required to pay overtime compensation to their fire protection and law enforcement employees on a workweek basis as required by section 7(a) of the Act unless they elect to take advantage of the partial overtime exemption provided in section 7(k) which applies, not on a workweek basis, but on a work period basis, as follows:

> * * * No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
>
> (1) In a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed 240 hours; or
>
> (2) In the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 240 hours bears to 28 days, compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(B) Effective January 1, 1976, section 7(k) is amended by striking out "240 hours" each place it occurs and inserting in lieu thereof "232 hours".

(C) Effective January 1, 1977, such section is amended by striking out "232" hours each place it occurs and inserting in lieu thereof "216 hours".

(D) Effective January 1, 1978, such section is amended—

(i) By striking out "exceed 216 hours" in paragraph (1) and inserting in lieu thereof "exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975"; and

(ii) By striking out "as 216 hours bears to 28 days" in paragraph (2) and inserting in lieu thereof "as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1) bears to 28 days * * *

(c) These statutory provisions, as is apparent from their terms, are limited to public agencies and do not apply to any private organization engaged in furnishing fire protection or law enforcement services, and this is so even if the services are provided under contract with a public agency.

(d) In determining whether a public agency qualifies for the section 13(b)(20) exemption after January 1, 1975, the fire protection and law enforcement activities are considered separately. Thus, for example, if a public agency employs less than five employees in fire protection activities but five or more employees in law enforcement activities (including security personnel in a correctional institution), it may claim the exemption for the fire protection employees but not for the law enforcement employees. No distinction is made between full-time and part-time employees, and both must be counted in determining whether the exemption applies. Bona fide volunteers may be excluded. This determination of the number of employees engaged in each of the two named activities is made on a workweek basis.

(e) In addition to the special exemptions provided in sections 7(k) and 13(b)(20), which are the subject matter of Part 53, the Act provides other exemptions which, depending upon the facts, may be claimed for certain employees in lieu of such special exemptions. For example, section 13(a)(1) provides a complete exemption for any employee employed in a bona fide executive, administrative or professional capacity, as those terms are defined and delimited in 29 CFR Part 541, and that exemption may be claimed for any fire protection or law enforcement employee who meets all of the tests specified in Part 541 relating to duties, responsibilities and salary. Thus, although police captains are clearly employees engaged in law enforcement activities, they may also, depending upon the facts, qualify for the section 13(a)(1) exemption, in which event the employing agency may claim that exemption for such employees in lieu of the section 7(k) or 13(b)(20) exemption. Similarly, certain criminal investigative agents may qualify as administrative employees, in which event the employing agency may elect which of the applicable exemptions it will claim for such employees. In no event, however will the election to take the section 13(a)(1) exemption for an employee who qualifies for it, result in excluding that employee from the count that must be made under § 553.1(d) in determining whether the employer may claim for its other employees the section 13(b) (20) exemption.

§ 553.2 Purpose and scope.

The purpose of Part 553 is to define the pertinent statutory terms used in sections 7(k) and 13(b)(20) and to set forth the rules by which the Administrator of the Wage and Hour Division will determine the compensable hours of work, tour of duty and work period in applying the section 7(k) exemption.

EMPLOYEES ENGAGED IN FIRE PROTECTION AND LAW ENFORCEMENT ACTIVITIES (INCLUDING SECURITY PERSONNEL IN CORRECTIONAL INSTITUTIONS)

§ 553.3 Fire protection activities.

(a) As used in section 7(k) and 13(b)(20) of the Act, the term "any employee in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district and who, pursuant to the extent required by State statute or local ordinance, has been trained and has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type and (2) who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent" employee, or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (d) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.7.

(b) The term "any employee in fire protection activities" also refers to employees who work for forest conservation agencies or other public agencies charged with forest firefighting responsibilities, and who direct or engage in (1) fire spotting or lookout activities, or (2) fighting fires on the fireline or from aircraft or (3) operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. The term includes all persons so engaged, regardless of their status as full time or part time agency employees or as temporary or casual workers employed for a particular fire or for periods of high fire danger, including those who have had no prior training. It does not include such agency employees as biologists and office personnel who do not fight fires on a regular basis, except, of course, during those emergency situations when they are called upon to spend substantially all (i.e., 80 percent or more) of their time during the applicable work period in one or more of the activities described in paragraph (b) (1), (2) and (3) of this section. Additionally, for those persons who actually engage in these fire protection activities, the simultaneous performance of such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads, would also be within the section 7(k) or 13(b)(20) exemption.

(c) Not included in the term "employee in fire protection activities" are the so-called "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc.

§ 553.4 Law enforcement activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee in law enforcement activities" refers to any employee (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics.

Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "trainee," "probationary" or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities such as equipment maintenance, and lecturing, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's law enforcement activities. See § 553.8.

(b) Typically, employees engaged in law enforcement activities include city police; district or local police; sheriffs, under sheriffs or deputy sheriffs who are regularly employed and paid as such; court marshals or deputy marshals; constables and deputy constables who are regularly employed and paid as such; border control agents; state troope . and highway patrol officers. Other agency employees not specifically mentioned may, depending upon the particular facts and pertinent statutory provisions in that jurisdiction, meet the three tests described above. If so, they will also qualify as law enforcement officers. Such employees might include, for example, fish and game wardens or criminal investigative agents assigned to the office of a district attorney, an attorney general, a solicitor general or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

(c) Some of the law enforcement officers listed above, including but not limited to certain sheriffs, will not be covered by the Act if they are elected officials and if they are not subject to the civil service laws of their particular State or local jurisdiction. Section 3(e)(2)(C) of the Act excludes from its definition of "employee" elected officials and their personal staff under the conditions therein prescribed. 29 U.S.C. 203(e)(2)(C). Such individuals, therefore, need not be counted in determining whether the public agency in question has less than five employees engaged in law enforcement activities for purposes of claiming the section 13(b)(20) exemption.

(d) Employees who do not meet each of the three tests described above are not engaged in "law enforcement activities," as that term is used in sections 7(k) and 13(b)(20). Such employees would typically include (1) building inspectors (other than those defined in § 553.3(a)), (2) health inspectors, (3) animal control personnel, (4) sanitarians, (5) civilian traffic employees who direct vehicular and pedestrian traffic at specified intersections or other control points, (6) civilian parking checkers who patrol assigned areas for the purpose of discovering parking violations and issuing appropriate warnings or appearance notices, (7) wage and hour compliance officers, (8) equal employment opportunity compliance officers, (9) tax compliance officers, (10) coal mining inspectors, and (11) building guards whose primary duty is to protect the lives and property of persons within the limited area of the building.

(e) The term "any employee in law enforcement activities" also includes, by express reference, "security personnel in correctional institutions." A correctional institution is any government facility maintained as part of a penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Typically, such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify as security personnel for purposes of the section 7(k) exemption are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions, regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank (e.g., warden, assistant warden or guard) or of their status as "trainee," "probationary," or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities, or to support activities of the type described in paragraph (f) of this section, whether or not such assignment is for training or familiarization purposes or for reasons of illness, injury or infirmity.

(f) Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions who engage in such support activities as those performed by dispatcher, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks and stenographers. Nor does the term include employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching, or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties.

§ 553.5 20 percent limitation on nonexempt work.

Employees engaged in fire protection or law enforcement activities, as described in §§ 553.3 and 553.4, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their firefighting activities. For example, those who work for forest conservation agencies may, during slack periods, plant trees and perform other conservation activities. The performance of such nonexempt work will not defeat either the section 7(k) or 13(b) (20) exemption unless it exceeds 20 percent of the total hours worked by the particular employee during the applicable work period.

§ 553.6 Public agency employees engaged in both fire protection and law enforcement activities.

Some public agencies have employees (sometimes referred to as public safety officers) who engage in both law enforcement activities and fire protection activities, depending upon the agency needs at the time. This dual assignment would not defeat either the section 7(k) or 13(b) (20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.3(a), 553.4 (a) and (e). This is so regardless of how the employees divide their time between the two types of activities. If, however, either the fire protection or law enforcement activities do not meet the tests of § 553.3(a) or § 553.4 (a) and (e), and if such nonqualifying activities, standing alone or in conjunction with some other nonexempt activity, exceed 20 percent of the employee's total hours of work in the work period, neither exemption would apply.

§ 553.7 Employees attending training facilities.

The attendance at a bona fide fire or police academy or other training facility, when required by the employing public agency, does not constitute engagement in exempt activities, unless the employee in question meets all the tests described in § 553.3(a) or § 553.4(a), as the case may be, in which event such training or further training would be incidental to, and thus part of, the employee's fire protection or law enforcement activities. Only the time spent in actual training or retraining constitutes compensable hours of work. All other time, such as that spent in studying and other personal pursuits, is not compensable hours of work even in situations where the employee is confined to campus or to barracks 24 hours a day. See § 553.14. Attendance at training facilities and schools, which is not required but which may incidentally improve the employee's performance of his or her regular tasks or prepare the employee for further advancement, need not be counted as working time even though the public agency may pay for all or part of such training.

§ 553.8 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received special training in the rescue of fire and accident victims or firefighters injured in the performance of their firefighting duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, riots, natural disasters and accidents.

(b) Ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 Amendments do not come within the section 7(k) or section 13(b)(20) exemptions, since it was not the purpose of those Amendments to deny the Act's protection of previously covered employees. This would include employees of public agencies engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institutions; a school for mentally or physically handicapped or gifted children; an elementary or secondary school; an institution of higher education; a street, suburban, or interurban electric railway; or local trolley or motor bus carrier.

(c) Ambulance and rescue service employees of private organizations do not come within the section 7(k) or 13(b)(20) exemptions even if their activities are substantially related to the fire protection and law enforcement activities performed by a public agency.

§ 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee will lose the exemption if the other work is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee and would have to pay overtime compensation for all hours worked for the two agencies in excess of 40 per week. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a)(3), the city would be entitled to claim the lesser of the two exemptions which, in the example given would be the section 7(k) exemption, and it would have to pay overtime compensation only for the combined hours (if any) which are in excess of the employee's tour of duty.

(b) These same principles also apply where the fire protection or law enforcement employee works for another public or private employer who, although entirely separate from the employee's regular employer, is none the less a joint employer with the fire protection or law enforcement agency. Usually, of course, working for a separate employer does not affect the employee's status as an employee engaged in fire protection or law enforcement activities or the employing agency's right to claim the section 7(k) or 13(b)(20) exemption. In some limited circumstances, however, the relationship between the fire protection or law enforcement agency and the other employer is so closely related that they must be treated as joint employers. Such a joint employment relationship exists where the work done by the employee simultaneously benefits both employers and where it is done pursuant to an arrangement between the employers to share or interchange employees, or where one employer acts directly or indirectly in the interest of the other employer in relation to the same employee, or where the employers are so closely associated that they share control of the employee, directly or indirectly. See 29 CFR Part 791.

(c) To illustrate, if a police officer independently finds after-hours employment as a repair mechanic in a gas station or as a security guard in a department store, there would be no joint employment relationship between the police department and the second employer. This would be so even if the police officer wore his or her uniform at the second job and even if the police department engaged in such "brokering" functions as maintaining a list of officers available for extra outside work and referring employment requests to such officers. Nor would it matter whether the police department also established a wage scale for such extra outside work and approved it so as to avoid any conflict of interest problem. On the other hand, if the second employer is required by local ordinance or otherwise to hire a police officer to control crowds at a stadium or to direct traffic at a sports arena or during a parade, such employment benefits both the police department and the second employer, and, since both act in the interest of the other, a joint employment relationship is created.

§ 553.10 Mutual aid.

If employees engaged in fire protection activities voluntarily respond to a call for aid from a neighboring jurisdiction, they are volunteers in rendering such aid and their employer is not required to compensate them for the time spent in the neighboring jurisdiction. See § 553.10. If, however, the employees respond to such a call because their employer has a mutual aid agreement with a neighboring jurisdiction or if the employees are directed by their agency to respond, all hours worked by these employees in rendering such aid must be added to their regular hours of work for purposes of the section 7(k) exemption.

§ 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average $2.50 per call will be considered nominal. Payments in excess of this amount may also qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the vounteer. For purposes of this paragraph, it is not necessary for the agency to maintain an exact record of expenses.

(b) Where, however, individuals engaged in fire protection or law enforcement activities receive more than a nominal amount or payment on a basis which does not reasonably approximate the expenses incurred by them, they are employees rather than volunteers and must be paid in accordance with the Act's requirements.

(c) Volunteers engaged in fire protection or law enforcement activities may include individuals who are employed in some other capacity by the same public agency. For example, a civilian PBX operator of a public agency engaged in law enforcement activities may also be a volunteer member of the local police reserve force. Similarly, an employee of a village Department of Parks and Recreation may serve as a volunteer firefighter in his or her local community.

(d) Police officers or firefighters of one jurisdiction may engage in fire protection or law enforcement activities on a voluntary basis for another jurisdiction where there is no mutual aid agreement or other relationship between the two jurisdictions. Such employees cannot, however, perform fire protection or law enforcement activities on a voluntary basis for their own agency, although they can engage in other activities not directly related to these primary functions. For example, a paramedic employed by a city fire department could volunteer to give a course in first aid at the city hospital and a police officer could volunteer to counsel young juveniles who are members of a boy's club or other similar organizations.

Rules for Determining the Tour of Duty, Work Period and Compensable Hours of Work

§ 553.12 General statement.

(a) In extending the Act's coverage to public agency employees engaged in fire protection and law enforcement activities, Congress, recognizing the uniqueness of these activities, established section 7(k) which permits the computation of hours worked on the basis of a work period (which can be longer than a workweek) and which bases the overtime requirements on a work period concept. In adding this provision, Congress made it clear that some adjustment would have to be made in the usual rules for determining compensable hours of work (Conf. Rept. 93-953, p. 27) and where the employer elects section 7(k), these rules must be used for purpose of both the Act's minimum wage and overtime requirements.

(b) If, however, any public agency chooses not to claim the partial overtime exemption provided in section 7(k), but elects to pay overtime compensation as required by section 7(a), it need not concern itself with the "tour of duty" or "work period" discussion which follows or with the special rules relating to the determination of what constitutes compensable hours of work since, in that event, overtime would be payable on a workweek basis and the regular method of computing "hours worked" as set forth in 29 CFR Part 785 would apply. Such an agency would not, however, be able to take advantage of the special provisions of Part 553 relating to the balancing of hours over an entire work period, trading time and early relief.

§ 553.13 Tour of duty.

The term "tour of duty," as used in section 7(k), means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times, or to scheduled periods outside the shift, as in the case of a special detail involving crowd control during a parade or other such event. Unscheduled periods refer to time spent in court by police officers, time spent handling emergency situations, or time spent after a shift in order to complete required work. When an employee actually works fewer hours than those scheduled, the employee's tour of duty is reduced accordingly. Nothing in section 7(k) precludes employers (acting pursuant to collective bargaining agreements or in accordance with their own authority) from establishing new tours of duty for their employees, provided, however, that the change is intended to be permanent at the time that it is made.

§ 553.14 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours thus include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See § 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits, also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in compensable hours of work. On the other hand, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also, a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls would be compensable, except in those instances where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes.

(b) Additional examples of compensable and noncompensable hours of work are set forth in 29 CFR Part 785 which is fully applicable to employees for whom the section 7(k) exemption is claimed except to the extent that it has been modified below in § 553.15.

§ 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21.

(b) Sleep and meal time may, however, be excluded in the case of fire protection or law enforcement employees who are on duty for more than 24 hours, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work. If, on the other hand, the agreement provides for the exclusion of sleep time the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which, for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

§ 553.16 Work period.

(a) As used in section 7(k), the term "work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the pay period or with a particular day of the week or hour of the day. Once the beginning time of an employee's work period is established, however, it remains fixed regardless of how many hours are worked within that period. The beginning of the work period, may, of course, be changed, provided that the change is intended to be permanent at the time that it is made.

(b) An employer may have one work period applicable to all of its employees, or different work periods for different employees or groups of employees. Prior approval from the Wage and Hour Division is not required. The employer must, however, make some notation in its records which shows the work period for each employee and which indicates the length of that period and its starting time.

(c) For those employees who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required until the ratio between the number of days in the work period and the hours worked during such work period exceeds the ratio between a work period of 28 days and 240 hours, at which point all additional hours are paid for at one and one-half times the employee's regular rate of pay.

(d) The ratio of 240 hours to 28 days is 8.57143 hours per day (8.57 rounded). Accordingly, overtime compensation at a rate of not less than one and one-half times the employee's regular rate of pay must be paid during calendar year 1975 for all hours worked in excess of the following maximum hours standards:

Work Period (days)	Maximum hours standard
28	240
27	231
26	223
25	214
24	206
23	197
22	189
21	180
20	171
19	163
18	154
17	146
16	137
15	129
14	120
13	111
12	103
11	94
10	86
9	77
8	69
7	60

§ 553.17 Early relief.

It is a common practice among employees engaged in fire protection activities to relieve employees on the previous shift or tour of duty prior to the scheduled starting time. Such early relief may occur pursuant to employee agreement, either expressed or implied. This practice will not have the effect of increasing the number of compensable hours of work where it is voluntary on the part of the employees and does not result, over a period of time, in their failure to receive proper compensation for all hours actually worked. On the other hand, if the practice is required by the employer the time involved must be added to the employee's tour of duty and treated as compensable time.

§ 553.18 Trading time.

Another common practice or agreement among employees engaged in fire protection or law enforcement activities is that of substituting for one another on regularly scheduled tours of duty (or for some part thereof) in order to permit an employee to absent himself or herself from work to attend to purely personal pursuits. This practice is commonly referred to as "trading time." Although the usual rules for determining hours of work would require that the additional hours worked by the substituting employee be counted in computing his or her total hours of work, the legislative history makes it clear that Congress intended the continued use of "trading time" "both within the tour of duty cycle * * * and from one cycle to another within the calendar or fiscal year without the employer being subject to [additional] overtime compensation by virtue of the voluntary trading of time by employees" (Congressional Record, March 28, 1974, Page S 4692). Accordingly, the practice of "trading time" will be deemed to have no effect on hours of work if the following criteria are met: (a) The trading of time is done voluntarily by the employees participating in the program and not at the behest of the employer; (b) the reason for trading time is due, not to the employer's business operations, but to the employee's desire or need to attend to personal matter; (c) a record is maintained by the employer of all time traded by his employees; (d) the period during which time is traded and paid back does not exceed 12 months.

§ 553.19 Time off for excess hours or so-called "comp time."

(a) As a general rule, all overtime hours must be paid for in cash and not in time off. Section 7(k) creates a partial exception to this general rule by allowing employers to balance the employee's hours over a work period, which, as indicated in § 553.16, may be longer than a workweek, and to pay the overtime compensation required by the Act only if the employee's hours exceed the total number of hours established by section 7(k) for that particular work period. Thus, for example, if the duration of the employee's work period is 28 consecutive days, and he or she works 80 hours in the first week, but only 60 in the second week and 50 in each of the next 2 weeks, no additional overtime compensation would be required, since the total number of hours worked does

BEST DOCUMENT AVAILABLE

not exceed 240. Of course, there might be a State law requiring overtime compensation at some earlier point (e.g., for any hours worked in excess of 40 in a week), but that obligation could be met with "comp time," if comp time is permissible under State law and if the wages paid to the employee for all hours worked during the entire 28-day tour of duty equal at least the minimum wage set forth in section 6(b) of the Act (29 U.S.C. 206(b)). Similarly, an employee whose work period is 1 week could be paid in "comp time" for all excess hours up to 60, provided that comp time is a permissible form of payment under State law and provided, also, that the wages paid to the employee equal at least the statutory minimum wage. Such "comp time" could be taken at any time authorized by state law or local ordinance.

(b) If the employee in either of the examples given above works more than the stated number of hours for a 7-day or 28-day work period, overtime compensation must be paid at one and one-half times the employee's regular rate. In computing the employee's regular rate, the cash equivalent of any comp time must be included. See also § 553.20.

§ 553.20 The "regular rate".

The rules for computing an employee's "regular rate," for purposes of the Act's overtime requirements, are set forth in 29 CFR Part 778. These rules are fully applicable to employees for whom the section 7(k) exemption is claimed, except that wherever the word "workweek" is used the word "work period" should be substituted.

§ 553.21 Records to be kept.

The recordkeeping requirements of the Act are set forth in 29 CFR Part 516. These requirements are applicable to public agencies engaged in fire protection and law enforcement activities, except that where section 7(k) is claimed, the records for those employees can be kept on a work period, instead of a workweek, basis. In addition, the records must show, as indicated in § 553.16(b), the work period for each employee.

PART 570—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

Subpart A—General

Sec.

570.1 Definitions.
570.2 Minimum age standards.

Subpart B—Certificates of Age

570.5 Authorized certificates and their effect.
570.6 Contents and disposition of certificate.
570.7 Documentary evidence required for issuance of certificate.
570.8 Federal certificates of age.
570.9 States in which State certificates are accepted.
570.10 Designation of the State of Alaska and the Territory of Guam.
570.11 Continued acceptability of certificates.
570.12 Revoked certificates.

PROVISIONS OF OTHER LAWS

570.25 Effect on other laws.

PROVISION FOR REVISION

570.27 Revision of this subpart.

Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

570.31 Determination.
570.32 Effect of this subpart.
570.33 Occupations.
570.34 Occupations in retail, food service, and gasoline service establishments.
570.35 Periods and conditions of employment.
570.35a Work experience and career exploration programs.
570.36 Certificates of age; effect.
570.37 Effect on other laws.
570.38 Revision of this subpart.

Subpart D—Procedure Governing Hazardous Occupation Determinations (Child Labor Reg. 5)

570.41 Administrative responsibility.
570.42 Reports of investigations.
570.43 Initiating proceedings.
570.44 Notice of proceedings.
570.45 Procedure governing oral participation.
570.46 Certification of the record.
570.47 Finding and order.
570.48 Special requests.
570.49 Amendments.

BEST DOCUMENT AVAILABLE

Subpart E—Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being

Sec.
570.50 General.
570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).
570.52 Motor-vehicle driver and outside helper (Order 2).
570.53 Coal-mine occupations (Order 3).
570.54 Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill (Order 4).
570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).
570.57 Exposure to radioactive substances and to ionizing radiations (Order 6).
570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).
570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).
570.60 Occupations in connection with mining, other than coal (Order 9).
570.61 Occupations involving slaughtering, meat packing or processing, or rendering (Order 10).
570.62 Occupations involved in the operation of bakery machines (Order 11).
570.63 Occupations involved in the operation of paper-products machines (Order 12).
570.64 Occupations involved in the manufacture of brick, tile, and kindred products (Order 13).
570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).
570.66 Occupations involved in wrecking, demolition, and shipbreaking operations (Order 15).
570.67 Occupations in roofing operations (Order 16).
570.68 Occupations in excavation operations (Order 17).

Subpart E-1—Occupations in Agriculture Particularly Hazardous for the Employment of Children Below the Age of 16

570.70 Purpose and scope.
570.71 Occupations involved in agriculture.
570.72 Exemptions.

Subpart F—[Reserved]

Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended

GENERAL

Sec.
570.101 Introductory statement.
570.102 General scope of statutory provisions.
570.103 Comparison with wage and hour provisions.

COVERAGE OF SECTION 12(a)

570.104 General.
570.105 "Producer, manufacturer, or dealer".
570.106 "Ship or deliver for shipment in commerce".
570.107 "Goods".
570.108 "Produced".
570.109 "Establishment situated in the United States".
570.110 "In or about".
570.111 Removal "within 30 days".

COVERAGE OF SECTION 12(c)

570.112 General.
570.113 Employment "in commerce or in the production of goods for commerce".

JOINT AND SEPARATE APPLICABILITY OF SECTIONS 12(a) AND 12(c)

570.114 General.
570.115 Joint applicability.
570.116 Separate applicability.

OPPRESSIVE CHILD LABOR

570.117 General.
570.118 Sixteen-year minimum.
570.119 Fourteen-year minimum.
570.120 Eighteen-year minimum.
570.121 Age certificates.

EXEMPTIONS

570.122 General.
570.123 Agriculture.
570.124 Delivery of newspapers.
570.125 Actors and performers.
570.126 Parental exemption.

ENFORCEMENT

570.127 General.
570.128 Good faith defense.
570.129 Relation to other laws.

SOURCE: 16 FR 7008, July 20, 1951, unless otherwise noted. Redesignated at 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971.

BEST DOCUMENT AVAILABLE

Subpart A—General

Authority: Secs. 3, 11, 12, 52 Stat. 1060, as amended, 1066, as amended, 1067, as amended; 29 U.S.C. 203, 211, 212.

Source: 41 FR 26834, June 29, 1976, unless otherwise noted.

§ 570.1 Definitions.

As used in this part:

(a) "Act" means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201-219).

(b) "Oppressive child labor" means employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in § 570.2 of this subpart.

(c) "Oppressive child labor age" means an age below the minimum age established under the Act for the occupation in which a minor is employed or in which his employment is contemplated.

(d) A "certificate of age" means a certificate as provided in § 570.5(b) (1) or (2) of this part.

(e) [Reserved]

(f) "Secretary" or "Secretary of Labor" means the Secretary of Labor, United States Department of Labor, or his authorized representative.

(g) "Wage and Hour Division" means the Wage and Hour Division, Employment Standards Administration, United States Department of Labor.

(h) "Administrator" means the Administrator of the Wage and Hour Division or his authorized representative.

(i) "State agency" means any officer, executive department, board, bureau or commission of a State or any division or unit thereof authorized to take action with respect to the application of laws relating to minors.

§ 570.2 Minimum age standards.

(a) *All occupations except in agriculture.* (1) The Act, in section 3(1), sets a general 16-year minimum age which applies to all employment subject to its child labor provisions in any occupation other than in agriculture, with the following exceptions:

(i) The Act authorizes the Secretary of Labor to provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor, if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being (see Subpart C of this part); and

(ii) The Act sets an 18-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors of such age or detrimental to their health or well-being (see Subpart E of this part).

(2) The Act exempts from its minimum age requirements the employment by a parent of his own child, or by a person standing in place of a parent of a child in his custody, except in occupations to which the 18-year age minimum applies and in manufacturing and mining occupations.

(b) *Occupations in agriculture.* The Act sets a 16-year age minimum for employment in agriculture during school hours for the school district in which the employed minor is living at the time, and also for employment in any occupation in agriculture that the Secretary of Labor finds and declares to be particularly hazardous except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person (see Subpart E-1 of this part). There is a minimum age requirement of 14 years generally for employment in agriculture outside school hours for the school district where such employee is living while so employed. However, (1) a minor 12 or 13 years of age may be so employed with written consent of his parent or person standing in place of his parent, or may work on a farm where such parent or person is also employed, and (2) a minor under 12 years of age may be employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person, or may be employed with consent of such parent or person on a farm where all employees are exempt from the minimum wage provisions by virtue of section 13(a)(6)(A) of the Act.

Subpart B—Certificates of Age

Authority: Secs. 3, 11, 12, 52 Stat. 1060, as amended, 1066, as amended, 1067, as amended; 29 U.S.C. 203, 211, 212.

Source: 41 FR 26835, June 29, 1976, unless otherwise noted.

§ 570.5 Authorized certificates and their effect.

(a) To protect an employer from unwitting violation of the minimum age standards under the Act, section 3(1) of the Act provides that "oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age." The provisions of this subpart provide for age certificates based on the best available documentary evidence of age. Certificates issued and effective pursuant to this subpart furnish an employer with proof of the age of a minor employee upon which he may rely in determining whether the minor is at least the minimum age for the occupation in which he is to be employed.

(b) The employment of any minor shall not be deemed to constitute oppressive shild labor under the Act if his employer shall have on file an unexpired certificate, issued and held in accordance with this subpart, which shall be either:

(1) A Federal certificate of age, issued by a person authorized by the Administrator of the Wage and Hour Division, showing that such minor is above the oppressive child-labor age applicable to the occupation in which he is employed, or

(2) A State certificate, which may be in the form of and known as an age, employment, or working certificate or permit, issued by or under the supervision of a State agency in a State which has been designated for this purpose by the Administrator showing that such minor is above the oppressive child-labor age applicable to the occupation in which the minor is employed. States so designated are listed in § 570.9(a). Any such certificate shall have the force and effect specified in § 570.9.

(c) The prospective employer of a minor, in order to protect himself from unwitting violation of the Act, should obtain a certificate (as specified in paragraphs (b) (1) and (2) of this section) for the minor if there is any reason to believe that the minor's age may be below the applicable minimum for the occupation in which he is to be employed. Such certificate should always be obtained where the minor claims to be only 1 or 2 years above the applicable minimum age for the occupation in which he is to be employed. It should also be obtained for every minor claiming to be older than 2 years above the applicable minimum age if his physical appearance indicates that this may not be true.

§ 570.6 Contents and disposition of certificate.

(a) Except as provided in §§ 570.9 and 570.10, a certificate of age which shall have the effect specified in § 570.5 shall contain the following information:

(1) Name and address of minor.

(2) Place and date of birth of minor, together with a statement indicating the evidence on which this is based. The place of birth need not appear on the certificate if it is obtained and kept on file by the person issuing the certificate.

(3) Sex of minor.

(4) Signature of minor.

(5) Name and address of minor's parent or person standing in place of parent. This information need not appear on the certificate if it is obtained and kept on file by the person issuing the certificate.

(6) Name and address of employer, if minor is under 18.

(7) Industry of employer, if minor is under 18.

(8) Occupation of minor, if minor is under 18.

(9) Signature of issuing officer.

(10) Date and place of issuance.

(b) (1) A certificate of age for a minor under 18 years of age shall be sent by a person authorized to issue such certificates to the prospective employer of the minor, who shall keep such certificate on file at the place of the minor's employment and who on the termination of the employment of the minor shall return the certificate to the person issuing it, except that a certificate issued for employment in agriculture may be given to the minor. A certificate returned to the issuing officer may be accepted as proof of age for the issuance of any subsequent certificate of age for that minor, without presentation of further proof of age, unless it is found that the proof of age originally submitted was in error.

(2) Whenever a certificate of age is issued for a minor 18 or 19 years of age it may be given to the minor by the person issuing the certificate. Every minor 18 or 19 years of age shall, upon entering employment, deliver his certificate of age to his employer for filing and upon the termination of the employment, the employer shall return the certificate to the minor.

§ 570.7 Documentary evidence required for issuance of certificate.

(a) Except as otherwise provided in §§ 570.9 and 570.10, a certificate of age which shall have the effect specified in § 570.5 shall be issued only upon application of the minor desiring employment or of the prospective employer to the person authorized to issue such certificate and only after acceptable documentary evidence of age has been received, examined, and approved. Such evidence shall consist of one of the following to be required in the order of preference herein designated:

(1) A birth certificate or attested transcript thereof or a signed statement of the recorded date and place of birth, issued by a registrar of vital statistics or other officer charged with the duty of recording births.

(2) A record of baptism or attested transcript thereof showing the date and place of birth and date and place of baptism of the minor, or a bona fide contemporary record of the date and place of the minor's birth kept in the Bible in which the records of the births in the family of the minor are preserved, or other documentary evidence satisfactory to the Administrator, such as a passport showing the age of the minor, or a certificate of arrival in the United States issued by the United States immigration office and showing the age of the minor, or a life-insurance policy: *Provided*, That such other documentary evidence has been in existence at least 1 year prior to the time it is offered as evidence: And *provided further*, That a school record of age or an affidavit of a parent or a person standing in place of a parent, or other written statement of age shall not be accepted except as specified in paragraph (a) (3) of this section;

(3) The school record or the school-census record of the age of the minor, together with the sworn statement of a parent or person standing in place of a parent as to the age of the minor and also a certificate signed by a physician specifying what in his opinion is the physical age of the minor. Such certificate shall show the height and weight of the minor and other facts concerning his physical development which were revealed by such examination and upon which the opinion of the physician as to the physical age of the minor is based. If the school or school-census record of age is not obtainable, the sworn statement of the parent or person standing in place of a parent as to the date of birth of the minor, together with a physician's certificate of age as hereinbefore specified, may be accepted as evidence of age.

(b) The officer issuing a certificate of age for a minor shall require the evidence of age specified in paragraph (a) (1) of this section in preference to that specified in paragraphs (a) (2) and (3) of this section, and shall not accept the evidence of age permitted by either subsequent paragraph unless he shall receive and file evidence that reasonable efforts have been made to obtain the preferred evidence required by the preceding paragraph or paragraphs before accepting any subsequently named evidence: *Provided*, That to avoid undue delay in the issuance of certificates, evidence specified in paragraph (a) (2) of this section may be accepted, or if such evidence is not available, evidence specified in paragraph (a) (3) of this section may be accepted if a verification of birth has been requested but has not been received from the appropriate bureau of vital statistics.

§ 570.8 Federal certificates of age.

A Federal certificate of age which shall have the effect specified in § 570.5 shall be issued by a person authorized by the Administrator of the Wage and Hour Division and shall be issued in accordance with the provisions of §§ 570.6 and 570.7.

§ 570.9 States in which State certificates are accepted.

(a) The States in which age, employment, or working certificates or permits have been found by the Administrator to be issued by or under the supervision of a State agency substantially in accordance with the provisions of §§ 570.6 and 570.7 and which are designated as States in which certificates so issued shall have the force and effect specified in § 570.5, except as individual certificates may be revoked in accordance with § 570.11 of this subpart, are:

Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.

(b) State certificates requiring conditions or restrictions additional to those required by this subpart shall not be deemed to be inconsistent herewith.

(c) The designation of a State under this section shall have force and effect indefinitely unless withdrawal of such designation is deemed desirable for the effective administration of the Act. No withdrawal of the designation of a State under this section shall make any certificate invalid if it was issued by or under the supervision of a State agency as herein provided prior to such withdrawal.

§ 570.10 Designation of the State of Alaska and the Territory of Guam.

The State of Alaska and the Territory of Guam are designated as States in which any of the following documents shall have the same effect as Federal certificates of age as specified in § 570.5:

(a) A birth certificate or attested transcript thereof, or a signed statement of the recorded date and place of birth issued by a registrar of vital statistics or other officer charged with the duty of recording births, or

(b) A record of baptism or attested transcript thereof showing the date of birth of the minor, or

(c) With respect to the State of Alaska, a statement on the census records of the Bureau of Indian Affairs and signed by an administrative representative thereof showing the name, date of birth, and place of birth of the minor.

§ 570.11 Continued acceptability of certificates.

(a) Whenever a person duly authorized to make investigations under this Act shall obtain substantial evidence that the age of the minor as given on a certificate held by an employer subject to this Act is incorrect, he shall inform the employer and the minor of such evidence and of his intention to request through the appropriate channels that action be taken to establish the correct age of the minor and to determine the continued acceptability of the certificate as proof of age under the Act. The said authorized person shall request in writing through the appropriate channels that action be taken on the acceptability of the certificate as proof of age under the Fair Labor Standards Act and shall state the evidence of age of the minor which he has obtained and the reasons for such request. A copy of this request shall be sent to the Administrator of the Wage and Hour Division for further handling through the State agency responsible for the issuance of certificates, except that in those States where Federal certificates of age are issued, action necessary to establish the correct age of the minor and to revoke the certificate if it is found that the minor is under age shall be taken by the Administrator of the Wage and Hour Division or his designated representative.

(b) The Administrator shall have final authority in those States in which State certificates are accepted as proof of age under the Act for determining the continued acceptability of the certificate, and shall have final authority for such determination in those States in which Federal certificates of age are issued. When such determination has been made in any case, notice thereof shall be given to the employer and the minor. In those cases involving the continued acceptability of State certificates, the appropriate State agency and the official who issued the certificate shall also be notified.

§ 570.12 Revoked certificates.

A certificate which has been revoked as proof of age under the Act shall be of no force and effect under the Act after notice of such revocation.

PROVISIONS OF OTHER LAWS

§ 570.25 Effect on other laws.

No provision of this subpart shall under any circumstances justify or be construed to permit noncompliance with the provisions of any other Federal law or of any State law or municipal ordinance establishing higher standards than those established under this subpart.

PROVISION FOR REVISION

§ 570.27 Revision of this subpart

Any person wishing a revision of any of the provisions of this subpart may submit in writing to the Secretary of Labor a petition setting forth the changes desired and the reasons for proposing them. If, after consideration of the petition, the Secretary believes that reasonable cause for amendment of the regulation is set forth, he shall make other provision for affording interested parties an opportunity to present their views, both in support of and in opposition to the proposed changes.

Subpart C—Employment of Minors Between 14 and 16 Years of Age (Child Labor Reg. 3)

AUTHORITY: Sec. 3, 52 Stat. 1060, as amended; 29 U.S.C. 203.

§ 570.31 Determination.

The employment of minors between 14 and 16 years of age in the occupations, for the periods, and under the conditions hereafter specified does not interfere with their schooling or with their health and well-being and shall not be deemed to be oppressive child labor.

§ 570.32 Effect of this subpart.

In all occupations covered by this subpart the employment (including suffering or permitting to work) by an employer of minor employees between 14 and 16 years of age for the periods and under the conditions specified in § 570.35 shall not be deemed to be oppressive child labor within the meaning of the Fair Labor Standards Act of 1938.

§ 570.33 Occupations.

This subpart shall apply to all occupations other than the following:

(a) Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;

(b) Occupations which involve the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(c) The operation of motor vehicles or service as helpers on such vehicles;

(d) Public messenger service;

(e) Occupations which the Secretary of Labor may, pursuant to section 3(1) of the Fair Labor Standards Act and Reorganization Plan No. 2, issued pursuant to the Reorganization Act of 1945, find and declare to be hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being;

(f) Occupations in connection with:

(1) Transportation of persons or property by rail, highway, air, water, pipeline, or other means;

(2) Warehousing and storage;

(3) Communications and public utilities;

(4) Construction (including demolition and repair);

except such office (including ticket office) work, or sales work, in connection with paragraphs (f) (1), (2), (3), and (4) of this section, as does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other media of transportation or at the actual site of construction operations.

§ 570.34 Occupations in retail, food service, and gasoline service establishments.

(a) This subpart shall apply to the following permitted occupations for minors between the ages of 14 and 16 employed by retail, food service, and gasoline service establishments.

(1) Office and clerical work, including the operation of office machines;

(2) Cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping;

(3) Price marking and tagging by hand or by machine, assembling orders, packing and shelving;

(4) Bagging and carrying out customers' orders;

(5) Errand and delivery work by foot, bicycle, and public transportation;

(6) Clean up work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds, but not including the use of power-driven mowers, or cutters;

(7) Kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of such work, such as but not limited to, dish-washers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, and coffee grinders;

(8) Work in connection with cars and trucks if confined to the following: Dispensing gasoline and oil; courtesy service; car cleaning, washing and polishing; and other occupations permitted by this section, but not including work involving the use of pits, racks, or lifting apparatus, or involving the inflation of any tire mounted on a rim equipped with a removable retaining ring.

(9) Cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing and stocking goods when performed in areas physically separate from those where the work described in paragraph (b)(7) of this section is performed;

(b) Paragraph (a) of this section shall not be construed to permit the application of this subpart to any of the following occupations in retail, food service, and gasoline service establishments;

(1) All occupations listed in § 570.33 except occupations involving processing, operation of machines and work in rooms where processing and manufacturing take place which are permitted by paragraph (a) of this section.

(2) Work performed in or about boiler or engine rooms;

(3) Work in connection with maintenance or repair of the establishment, machines or equipment;

(4) Outside window washing that involves working from window sills, and all work requiring the use of ladders, scaffolds, or their substitutes;

(5) Cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking;

(6) Occupations which involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers, and cutters, and bakery-type mixers;

(7) Work in freezers and meat coolers and all work in the preparation of meats for sale except as described in paragraph (a)(9) of this section;

(8) Loading and unloading goods to and from trucks, railroad cars, or conveyors;

(9) All occupations in warehouses except office and clerical work.

[27 FR 4165, May 2, 1962. Redesignated at 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.35 Periods and conditions of employment.

(a) Except as provided in paragraph (b) of this section, employment in any of the occupations to which this subpart is applicable shall be confined to the following periods:

(1) Outside school hours;

(2) Not more than 40 hours in any 1 week when school is not in session;

(3) Not more than 18 hours in any 1 week when school is in session;

(4) Not more than 8 hours in any 1 day when school is not in session;

(5) Not more than 3 hours in any 1 day when school is in session;

(6) Between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

(b) In the case of enrollees in work training programs conducted under part B of title I of the Economic Opportunity Act of 1964, there is an exception to the requirement of paragraph (a)(1) of this section if the employer has on file with his records kept pursuant to Part 516 of this chapter an unrevoked written statement of the Regional Manpower Administrator or his representative setting out the periods which the minor will work and certifying that his employment confined to such periods will not interfere with his health and well-being, countersigned by the principal of the school which the minor is attending with his certificate that such employment will not interfere with the minor's schooling.

[32 FR 15478, Nov. 8, 1967. Redesignated and amended at 36 FR 25156, Dec. 29, 1971, and further amended at 37 FR 5246, Mar. 11, 1972]

§ 570.35a Work experience and career exploration programs.

(a) This section varies some provisions of this subpart for the employment of minors between 14 and 16 years of age who are enrolled in and employed pursuant to a school-supervised and school-administered work-experience and career exploration program which meets the requirements of paragraph (b) of this section, in the occupations permitted under paragraph (c) of this section, and for the periods and under the conditions specified in paragraph (d) of this section. With these safeguards, such employment is found not to interfere with the schooling of the minors or with their health and well-being and therefore is not deemed to be oppressive child labor.

(b) (1) A school-supervised and school-administered work-experience and career exploration program shall meet the educational standards established and approved by the State Educational Agency in the respective State.

(2) The State Educational Agency shall file with the Administrator of the Wage and Hour Division a letter of application for approval of a State program as one not interfering with schooling or with the health and well-being of the minors involved and therefore not constituting oppressive child labor. The application must include information concerning the criteria listed in paragraph (b)(3) of this section. The Administrator of the Wage and Hour Division shall approve the application, or give prompt notice of any denial and the reasons therefor.

(3) The criteria to be used in consideration of applications are the following:

(i) *Eligibility.* Any student aged 14 or 15 years who authoritative local school personnel identify as being able to benefit from the program shall be eligible to participate.

(ii) *Credits.* Students shall receive school credits for both in-school related instruction and on-the-job experience.

(iii) *Size.* Each program unit shall be a reasonable size. A unit of 12 to 25 students to one teacher-coordinator would be generally considered reasonable. Whether other sizes are reasonable would depend upon the individial facts and circumstances involved.

(iv) *Instructional schedule.* There shall be (*a*) allotted time for the required classroom instruction in those subjects necessary for graduation under the State's standards and (*b*) regularly scheduled classroom periods of instruction devoted to job-related and to employability skill instruction.

(v) *Teacher-coordinator.* Each program unit shall be under the supervision of a school official to be designated for the purpose of the program as a teacher-coordinator, who shall generally supervise the program and coordinate the work and education aspects of the program and make regularly scheduled vists to the work stations.

(vi) *Written training agreement.* No student shall participate in the program until there has been made a written training agreement signed by the teacher-coordinator, the employer, and the student.The agreement shall also be signed or otherwise consented to by the student's parent or guardian.

(vii) *Other provisions.* Any other provisions of the program providing safeguards ensuring that the employment permitted under this section will not interfere with the schooling of the minors or with their health and well-being may also be submitted for use in consideration of the application.

(4) Every State Educational Agency having students in a program approved pursuant to the requirements of this section shall comply with the following:

(i) *Permissible occupations.* No student shall be assigned to work in any occupation other than one permitted under paragraph (c) of this section.

(ii) *Records and reports.* The names and addresses of each school enrolling work experience and career exploration program students and the number of enrollees in each unit shall be kept at the State Educational Agency office. A copy of the written training agreement for each student participating in the program shall be kept in the State Educational Agency office or in the local educational office. The records required for this paragraph shall be kept for a period of 3 years from the date of enrollment in the program and shall be made available for inspection or transcription to the representatives of the Administrator of the Wage and Hour Division.

(c) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be permitted in all occupations except the following:

(1) Manufacturing and mining.

(2) Occupations declared to be hazardous for the employment of minors between 16 and 18 years of age in Subpart E of this part, and occupations in agriculture declared to be hazardous for employment of minors below the age of 16 in Subpart E-1 of this part.

(3) Occupations other than those permitted under §§ 570.33 and 570.34, except upon approval of a variation in individual cases or classes of cases by the Administrator of the Wage and Hour Division after notice to interested persons and opportunity to be heard. Any such variation of general application shall be published as an amendment to this subpart. Applications for such approval may be included with the application for approval of the program; or filed specifically under § 570.38. Such applications shall be processed under § 570.38.

(d) Employment of minors enrolled in a program approved pursuant to the requirements of this section shall be confined to not more than 23 hours in any 1 week when school is in session and not more than 3 hours in any day when school is in session, any portion of which may be during school hours. Insofar as these provisions are inconsistent with the provisions of § 570.35, this section shall be controlling.

(e) The employment of a minor enrolled in a program pursuant to the requirements of this section must not have the effect of displacing a worker employed in the establishment of the employer.

(f) Programs shall be in force and effect for a period of two (2) school years from the date of their approval by the Administrator of the Wage and Hour Division. A new application for approval must be filed at the end of that period. Failure to meet the requirements of this section may result in withdrawal of approval.

OMB CONTROL No.: 1215-0121. (47 FR 145, Jan. 5, 1982; 47 FR 28095, June 29, 1982)

[40 FR 40801, Sept. 4, 1975; 40 FR 44130, Sept. 25, 1975]

§ 570.36 Certificates of age; effect.

The employment of any minor in any of the occupations to which this subpart is applicable, if confined to the periods specified in § 570.35, shall not be deemed to constitute oppressive child labor within the meaning of the act if the employer shall have on file an unexpired certificate, issued in substantially the same manner as that provided for the issuance of certificates in Subpart A of this part relating to certificates of age, certifying that such minor is of an age between 14 and 16 years.

[16 FR 7008, July 20, 1951. Redesignated at 27 FR 4165, May 2, 1962, and 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.37 Effect on other laws.

No provision of this subpart shall under any circumstances justify or be construed to permit noncompliance with the wage and hour provisions of the act or with the provisions of any other Federal law or of any State law or municipal ordinance establishing higher standards than those established under this subpart.

[16 FR 7008, July 20, 1951. Redesignated at 27 FR 4165, May 2, 1962 and 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.38 Revision of this subpart.

Any person wishing a revision of any of the terms of this subpart may submit in writing to the Secretary of Labor a petition setting forth the changes desired and the reasons for proposing them. If, after consideration of the petition, the Secretary of Labor believes that reasonable cause for amendment of the subpart is set forth, he shall either schedule a hearing with due notice to interested parties, or shall make other provision for affording interested parties an opportunity to be heard.

[16 FR 7008, July 20, 1951. Redesignated at 27 FR 4165, May 2, 1962, and 28 FR 1634, Feb. 21, 1963. Further redesignated at 36 FR 25156, Dec. 29, 1971]

Subpart D—Procedure Governing Hazardous Occupation Determinations (Child Labor Reg. 5)

AUTHORITY: Sec. 3, 52 Stat. 1061, as amended; 29 U.S.C. 203. Interpret or apply secs. 3, 4, and 6, 60 Stat. 238 and 240; 5 U.S.C. 552, 553, 555.

SOURCE: 26 FR 5005, June 6, 1961, unless otherwise noted. Redesignated at 36 FR 25156, Dec. 29, 1971.

§ 570.41 Administrative responsibility.

The Secretary of Labor shall be assisted by the Wage and Hour Division in making studies and investigation to discover (a) the occupations which appear to be particularly hazardous for the employment of children between 16 and 18 years of age or detrimental to their health or well-being; and (b) the occupations in agriculture which appear to be particularly hazardous for the employment of children below the age of 16. All interested persons and organizations are invited to cooperate with the Secretary and the Division by making suggestions and requests and providing pertinent information to the Division concerning employment hazards to minors. Submissions should be mailed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, D.C. 20210. In addition, the Administrator of the Wage and Hour Division shall have authority to obtain information by holding conferences to which he may invite various persons who have had experience or expert knowledge concerning occupational hazards to children.

[32 FR 6136, Apr. 19, 1967. Redesignated at 36 FR 25156, Dec. 29, 1971]

§ 570.42 Reports of investigations.

The Administrator of the Wage and Hour Division shall from time to time prepare and submit to the Secretary of Labor reports of investigations with respect to (a) any occupations or group of occupations which he has reason to believe should be added to, or deleted from, the list of those found and declared to be particularly hazardous for the employment of children between 16 and 18 years of age or detrimental to their health or well-being; and (b) any occupations or group of occupations in agriculture which he has reason to believe should be added to, or deleted from, the list of those found and declared to be particularly hazardous for the employment of children below the age of 16. Each such report shall contain an explanation of the hazards involved and the reasons why children between 16 and 18 years of age, or children below the age of 16, as the case may be, are, or are not, particularly susceptible to them. Copies of such reports shall be made available to the public at the offices of the Wage and Hour Division.

[32 FR 6136, Apr. 19, 1967. Redesignated at 36 FR 25156, Dec. 29, 1971]

§ 570.43 Initiating proceedings.

The Secretary, on recommendation of the Bureau or on his own motion, shall initiate proceedings to make, amend, or revoke a hazardous occupation order.

§ 570.44 Notice of proceedings.

Notice of the initiation of the proceedings shall be published in the FEDERAL REGISTER. Such notice will (a) refer to section 3(1) or to section 13(c) of the Fair Labor Standards Act of 1938 (52 Stat. 1061, 63 Stat. 918, as amended; 29 U.S.C. 203, 213), as the case may be, and to Reorganization Plan No. 2 of 1946 (3 CFR, 1943-48 Comp., p. 1064) as authority for the proposal and direct attention to this Subpart D governing the procedure; (b) contain the terms or substance of the proposed order or the proposed change in an existing order; (c) invite interested persons to participate in the proceedings through the submission of pertinent written data, views, and arguments, specifying the time and place for such submissions. If it is decided that the opportunity for public written participation is to be supplemented with an opportunity for oral participation, a time and place shall also be specified for oral submissions of data, views, and arguments.

[32 FR 6136, Apr. 19, 1967. Redesignated at 36 FR 25156, Dec. 29, 1971]

§ 570.45 Procedure governing oral participation.

Such oral submissions as may be invited by the notice shall be heard at proceedings presided over by examiners appointed under section 11 of the Administrative Procedure Act and assigned by the Chief Hearing Examiner of the Department of Labor. Such proceedings shall be reported, and transcripts made available to interested persons on such terms as the hearing examiner may provide. Any pertinent investigations or studies made by the Wage and Hour Division and the support of any suggestions it may make shall be presented, through witnesses supplied by the Division by an attorney assigned by the Solicitor of Labor, who may call and examine such other witnesses and undertake such cross examination of witnesses called by others, as may seem appropriate. Subject to such limitations as the hearing examiner may impose to expedite the proceedings, limit the record, and confine it to pertinent matter, every interested person in attendance or represented at the proceedings shall have the opportunity to give evidence through witnesses he may produce, cross examine witnesses produced by others, and make argument based on all of the evidence received. The hearing examiner shall regulate the course of the proceeding and dispose of procedural requests, objections, and comparable matters. He shall have power, in his discretion, to call and examine witnesses, to administer oaths and affirmations, to enforce his decisions by governing the content of the record and by excluding persons from the hearing room, and to keep the record open for a reasonable stated time after the proceeding to receive written proposals and supporting reasons, based on the record of the proceedings, from those who have participated in making it.

§ 570.46 Certification of the record.

Following the close of the record of any oral proceeding held pursuant to §§ 570.44 and 570.45 the hearing examiner shall certify to the Secretary of Labor the transcript of the proceeding, all exhibits received in evidence, and any proposals and supporting reasons that may have been filed pursuant to leave granted at the proceeding, together with any comments he may deem helpful concerning any issue as to credibility of witnesses that may have developed at the proceeding.

§ 570.47 Finding and order.

Following receipt of all written data, views, or argument submitted in accordance with the notice provided in § 570.44 and certification of the record pursuant to § 570.46 of any oral proceedings held pursuant to §§ 570.44 and 570.45, the Secretary of Labor shall give careful consideration to all relevant matter and will, thereafter, make a final finding and order adopting, rejecting, or modifying a hazardous occupation order. The Secretary's final decision will be expressed in a document signed by him and published in the FEDERAL REGISTER making any necessary amendment to this Title 29. Such document will incorporate a concise general statement of its basis and purpose, and except to the extent that it relieves restriction, shall provide an effective date for the change not less than thirty days after the date of publication in the FEDERAL REGISTER, unless a shorter time is provided for good cause found and expressed in the document.

§ 570.48 Special requests.

Any person may at any time file with the Administrator of the Wage and Hour Division a written application, petition or other requests in connection with any proceeding to make, amend, or revoke a hazardous occupation order. In the event his petition is denied, he will be advised promptly with a simple statement of reasons.

§ 570.49 Amendments.

Any interested person adversely affected or aggrieved by the procedure provided in §§ 570.41 through 570.48 may file a petition for a change with the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210, expressing the change desired with supporting reasons.

Subpart E—Occupations Particularly Hazardous for the Employment of Minors Between 16 and 18 Years of Age or Detrimental to Their Health or Well-Being

AUTHORITY: Secs. 3, 18, 52 Stat. 1060, 1069; 29 U.S.C. 203, 218.

NOTE: The provisions of this subpart declaring certain occupations to be particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being do not apply to employment in agriculture.

§ 570.50 General.

(a) *Higher standards.* Nothing in this subpart shall authorize non-compliance with any Federal or State law, regulation, or municipal ordinance establishing a higher standard. If more than one standard within this subpart applies to a single activity the higher standard shall be applicable.

(b) *Apprentices.* Some sections in this subpart contain an exemption for the employment of apprentices. Such an exemption shall apply only when (1) the apprentice is employed in a craft recognized as an apprenticeable trade; (2) the work of the apprentice in the occupations declared particularly hazardous is incidental to his training; (3) such work is intermittent and for short periods of time and is under the direct and close supervision of a journeyman as a necessary part of such apprentice training; and (4) the apprentice is registered by the Bureau of Apprenticeship and Training of the United States Department of Labor as employed in accordance with the standards established by that Bureau, or is registered by a State agency as employed in accordance with the standards of the State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, or is employed under a written apprenticeship agreement and conditions which are found by the Secretary of labor to conform substantially with such Federal or State standards.

(c) *Student-learners.* Some sections in this subpart contain an exemption for the employment of student-learners. Such an exemption shall apply when (1) the student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized State or local educational authority or in a course of study in a substantially similar program conducted by a private school and; (2) such student-learner is employed under a written agreement which provides:

(i) That the work of the student-learner in the ocupations declared particularly hazardous shall be incidental to his training;

(ii) That such work shall be intermittent and for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(iii) That safety instructions shall be given by the school and correlated by the employer with on-the-job training; and

(iv) That a schedule of organized and progressive work processes to be performed on the job shall have been prepared.

Each such written agreement shall contain the name of student-learner, and shall be signed by the employer and the school coordinator or principal. Copies of each agreement shall be kept on file by both the school and the employer. This exemption for the employment of student-learners may be revoked in any individual situation where it is found that reasonable precautions have not been observed for the safety of minors employed thereunder. A high school graduate may be employed in an occupation in which he has completed training as provided in this paragraph as a student-learner, even though he is not yet 18 years of age.

[28 FR 3449, Apr. 9, 1963, as amended at 33 FR 12777, Sept. 10, 1968. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.51 Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components (Order 1).

(a) *Finding and declaration of fact.* The following occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components are particularly hazardous for minors between 16 and 18 years of age or detrimental to their health or well-being:

(1) All occupations in or about any plant or establishment (other than retail establishments or plants or establishments of the type described in paragraph (a)(2) of this section) manufacturing or storing explosives or articles containing explosive components except where the occupation is performed in a "nonexplosives area" as defined in paragraph (b)(3) of this section.

(2) The following occupations in or about any plant or establishment manufacturing or storing small-arms ammunition not exceeding .60 caliber in size, shotgun shells, or blasting caps when manufactured or stored in conjunction with the manufacture of small-arms ammunition:

(i) All occupations involved in the manufacturing, mixing, transporting, or handling of explosive compounds in the manufacture of small-arms ammunition and all other occupations requiring the performance of any duties in the explosives area in which explosive compounds are manufactured or mixed.

(ii) All occupations involved in the manufacturing, transporting, or handling of primers and all other occupations requiring the performance of any duties in the same building in which primers are manufactured.

(iii) All occupations involved in the priming of cartridges and all other occupations requiring the performance of any duties in the same workroom in which rim-fire cartridges are primed.

(iv) All occupations involved in the plate loading of cartridges and in the operation of automatic loading machines.

(v) All occupations involved in the loading, inspecting, packing, shipping and storage of blasting caps.

(b) *Definitions.* For the purpose of this section:

(1) The term "plant or establishment manufacturing or storing explosives or articles containing explosive component" means the land with all the buildings and other structures thereon used in connection with the manufacturing or processing or storing of explosives or articles containing explosive components.

(2) The terms "explosives" and "articles containing explosive components" mean and include ammunition, black powder, blasting caps, fireworks, high explosives, primers, smokeless powder, and all goods classified and defined as explosives by the Interstate Commerce Commission in regulations for the transportation of explosives and other dangerous substances by common carriers (49 CFR Parts 71 to 78) issued pursuant to the act of June 25, 1948 (62 Stat.739; 18 U.S.C. 835).

(3) An area meeting all of the criteria in paragraphs (b)(3) (i) through

(iv) of this section shall be deemed a "nonexplosives area":

(i) None of the work performed in the area involves the handling or use of explosives;

(ii) The area is separated from the explosives area by a distance not less than that prescribed in the American Table of Distances for the protection of inhabited buildings;

(iii) The area is separated from the explosives area by a fence or is otherwise located so that it constitutes a definite designated area; and

(iv) Satisfactory controls have been established to prevent employees under 18 years of age within the area from entering any area in or about the plant which does not meet criteria of paragraphs (b)(3) (i) through (iii) of this section.

[17 FR 4324, May 13, 1952. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.52 Motor-vehicle driver and outside helper (Order 2).

(a) *Finding and declaration of fact.* Except as provided in paragraph (b) of this section, the occupations of motor-vehicle driver and outside helper on any public road, highway, in or about any mine (including open pit mine or quarry), place where logging or saw-mill operations are in progress, or in any excavation of the type identified in § 570.68(a) are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) *Exemptions*—(1) *Incidental and occasional driving.* The finding and declaration in paragraph (a) of this section shall not apply to the operation of automobiles or trucks not exceeding 6,000 pounds gross vehicle weight if such driving is restricted to daylight hours: *Provided*, Such operation is only occasional and incidental to the child's employment; that the child holds a State license valid for the type of driving involved in the job which he performs and has completed a State approved driver education course: *And provided further*, That the vehicle is equipped with a seat belt or similar device for the driver and for each helper, and the employer has instructed each child that such belts or other devices must be used. This paragraph shall not be applicable to any occupation of motor-vehicle driver which involves the towing of vehicles.

(2) *School bus driving.* The finding and declaration in paragraph (a) of this section shall not apply to driving a school bus during the period of any exemption which has been granted in the discretion of the Secretary of Labor on the basis of an application filed and approved by the Governor of the State in which the vehicle is registered. The Secretary will notify any State which inquires of the information to be furnished in the application. Neither shall the finding and declaration in paragraph (a) of this section apply in a particular State during a period not to exceed the first 40 days after this amendment is effective while application for such exemption is being formulated by such State seeking merely to continue in effect unchanged its current program using such drivers, nor while such application is pending action by the Secretary.

(3) *Evaluation of application for exemption for school bus driving.* In evaluating the application of a State for an exemption for school bus driving under paragraph (b)(2) of this section the Secretary will consider the following:

(i) Whether the accident experience of school bus drivers under 18 years of age in the State, if any are employed, compares favorably with that of adult school bus drivers.

(ii) Whether school bus drivers are selected by the school principal and approved by the county superintendent or an official of equivalent responsibility.

(iii) Whether school bus drivers are required to have completed a State approved driver education course, or a special school bus driver training course prior to being allowed to transport passengers.

(iv) Whether training and testing of school bus drivers includes classroom and behind-the-wheel training and is this done by qualified officials.

(v) Whether school bus drivers are required to pass a physical examination.

(vi) Whether the operation of school buses is supervised by the school principal, the transportation or other equivalent officer, and State, county, or city police.

(vii) Whether school buses are thoroughly inspected a minimum of four times a year at a State, district, or county inspection station and receive maintenance and repairs at regular intervals to ascertain and insure their safe operating conditions on a continuous basis, and that all inspections, maintenance, and repairs are performed by qualified inspectors and mechanics.

(viii) Whether school bus drivers are provided with and required to use seat belts.

(ix) Whether adequate measures are taken by State and local officials to control the speed of school buses in order to insure that the buses are not driven at a speed greater than is reasonable and prudent.

(x) Whether adult chaperones, approved by local school authorities, accompany school bus drivers on special activity trips sponsored by the school.

(xi) Whether the school buses conform substantially to the minimum Standards for School Buses, 1964 Revised Edition, recommended by the National Conference on School Transportation and published by the National Education Association.

(xii) Any other factors which the Secretary may find relevant in evaluating the application for exemption.

(c) *Definitions.* For the purpose of this section:

(1) The term "motor vehicle" shall mean any automobile, truck, truck-tractor, trailer, semitrailer, motorcycle, or similar vehicle propelled or drawn by mechanical power and designed for use as a means of transportation but shall not include any vehicle operated exclusively on rails.

(2) The term "driver" shall mean any individual who, in the course of his employment, drives a motor vehicle at any time.

(3) The term "outside helper" shall mean any individual, other than a driver, whose work includes riding on a motor vehicle outside the cab for the purpose of assisting in transporting or delivering goods.

(4) The term "gross vehicle weight" includes the truck chassis with lubricants, water and full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body, and special chassis and body equipment, and payload.

[33 FR 12777, Sept. 10, 1968, as amended at 34 FR 12946, Aug. 9, 1969. Redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.53 Coal-mine occupations (Order 3).

(a) *Finding and declaration of fact.* All occupations in or about any coal mine, except the occupation of slate or other refuse picking at a picking table or picking chute in a tipple or breaker and occupations requiring the performance of duties solely in offices or in repair or maintenance shops located in the surface part of any coal-mining plant, are particularly hazardous for the employment of minors between 16 and 18 years of age.

(b) *Definitions.* For the purpose of this section:

(1) The term "coal" shall mean any rank of coal including lignite, bituminous, and the anthracite coals.

(2) The term "all occupations in or about any coal mine" shall mean all types of work performed in any underground working, open-pit, or surface part of any coal-mining plant, that contribute to the extraction, grading, cleaning, or other handling of coal.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.54 Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill (Order 4).

(a) *Finding and declaration of fact.* All occupations in logging and all occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill are particularly hazardous for the employment of minors between 16 and 18 years of age, except the following:

(1) Exceptions applying to logging:

(i) Work in offices or in repair or maintenance shops.

(ii) Work in the construction, operation, repair, or maintenance of living and administrative quarters of logging camps.

(iii) Work in timber cruising, surveying, or logging-engineering parties; work in the repair or maintenance of roads, railroads, or flumes; work in forest protection, such as clearing fire trails or roads, piling and burning slash, maintaining fire-fighting equipment, constructing and maintaining telephone lines, or acting as fire lookout or fire patrolman away from the actual logging operations: *Provided*, That the provisions of this paragraph shall not apply to the felling of bucking of timber, the collecting or transporting of logs, the operation of power-driven machinery, the handling or use of explosives, and work on trestles.

(iv) Peeling of fence posts, pulpwood, chemicalwood, excelsior wood, cordwood, or similar products, when not done in conjunction with and at the same time and place as other logging occupations declared hazardous by this section.

(v) Work in the feeding or care of animals.

(2) Exceptions applying to the operation of any permanent sawmill or the operation of any lath mill, shingle mill, or cooperage-stock mill: *Provided*, That these exceptions do not apply to a portable sawmill the lumberyard of which is used only for the temporary storage of green lumber and in connection with which no office or repair or maintenance shop is ordinarily maintained: *And further provided*, That these exceptions do not apply to work which entails entering the sawmill building:

(i) Work in offices or in repair or maintenance shops.

(ii) Straightening, marking, or tallying lumber on the dry chain or the dry drop sorter.

(iii) Pulling lumber from the dry chain.

(iv) Clean-up in the lumberyard.

(v) Piling, handling, or shipping of cooperage stock in yards or storage sheds other than operating or assisting in the operation of power-driven equipment.

(vi) Clerical work in yards or shipping sheds, such as done by ordermen, tally-men, and shipping clerks.

(vii) Clean-up work outside shake and shingle mills, except when the mill is in operation.

(viii) Splitting shakes manually from precut and split blocks with a froe and mallet, except inside the mill building or cover.

(ix) Packing shakes into bundles when done in conjunction with splitting shakes manually with a froe and mallet, except inside the mill building or cover.

(x) Manual loading of bundles of shingles or shakes into trucks or railroad cars, provided that the employer has on file a statement from a licensed doctor of medicine or osteopathy certifying the minor capable of performing this work without injury to himself.

(b) *Definition*. As used in this section:

(1) The term "all occupations in logging" shall mean all work performed in connection with the felling of timber; the bucking or converting of timber into logs, poles, piles, ties, bolts, pulpwood, chemical wood, excelsior wood, cordwood, fence posts, or similar products; the collecting, skidding, yarding, loading, transporting and unloading of such products in connection with logging; the constructing, repairing and maintaining of roads, railroads, flumes, or camps used in connection with logging; the moving, installing, rigging, and maintenance of machinery or equipment used in logging; and other work performed in connection with logging. The term shall not apply to work performed in timber culture, timber-stand improvement, or in emergency fire-fighting.

(2) The term "all occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill" Shall mean all work performed in or about any such mill in connection with storing of logs and bolts; converting logs or bolts into sawn lumber, laths, shingles, or cooperage stock; storing, drying, and shipping lumber, laths, shingles, cooperage stock, or other products of such mills; and other work performed in connection with the operation of any sawmill, lath mill, shingle mill, or cooperage-

stock mill. The term shall not include work performed in the planing-mill department or other remanufacturing departments of any sawmill, or in any planing mill or remanufacturing plant not a part of a sawmill.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963; 32 FR 6024, Apr. 15, 1967. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.55 Occupations involved in the operation of power-driven woodworking machines (Order 5).

(a) *Finding and declaration of fact.* The following occupations involved in the operation of power-driven woodworking machines are particularly hazardous for minors between 16 and 18 years of age:

(1) The occupation of operating power-driven woodworking machines, including supervising or controlling the operation of such machines, feeding material into such machines, and helping the operator to feed material into such machines but not including the placing of material on a moving chain or in a hopper or slide for automatic feeding.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning power-driven woodworking machines.

(3) The occupations of off-bearing from circular saws and from guillotine-action veneer clippers.

(b) *Definitions.* As used in this section:

(1) The term "power-driven woodworking machines" shall mean all fixed or portable machines or tools driven by power and used or designed for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening, or otherwise assembling, pressing, or printing wood or veneer.

(2) The term "off-bearing" shall mean the removal of material or refuse directly from a saw table or from the point of operation. Operations not considered as off-bearing within the intent of this section include (i) the removal of material or refuse from a circular saw or guillotine-action veneer clipper where the material or refuse has been conveyed away from the saw table or point of operation by a gravity chute or by some mechanical means such as a moving belt or expulsion roller, and (ii) the following operations when they do not involve the removal of material or refuse directly from a saw table or from the point of operation: the carrying, moving, or transporting of materials from one machine to another or from one part of a plant to another; the piling, stacking, or arranging of materials for feeding into a machine by another person; and the sorting, tying, bundling, or loading of materials.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.57 Exposure to radioactive substances and to ionizing radiations (Order 6).

(a) *Finding and declaration of fact.* The following occupations involving exposure to radioactive substances and to ionizing radiations are particularly hazardous and detrimental to health for minors between 16 and 18 years of age:

(1) Any work in any workroom in which (i) radium is stored or used in the manufacture of self-luminous compound, (ii) self-luminous compound is made, processed, or packaged, (iii) self-luminous compound is stored, used, or worked upon, (iv) incandescent mantles are made from fabric and solutions containing thorium salts, or are processed or packaged, (v) other radioactive substances are present in the air in average concentrations exceeding 10 percent of the maximum permissible concentrations in the air recommended for occupational exposure by the National Committee on Radiation Protection, as set forth in the 40-hour week column of table one of the National Bureau of Standards Handbook No. 69 entitled "Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides

in Air and in Water for Occupational Exposure," issued June 5, 1959.

(2) Any other work which involves exposure to ionizing radiations in excess of 0.5 rem per year.

(b) *Definitions.* As used in this section:

(1) The term "self-luminous compound" shall mean any mixture of phosphorescent material and radium, mesothorium, or other radioactive element;

(2) The term "workroom" shall include the entire area bounded by walls of solid material and extending from floor to ceiling;

(3) The term "ionizing radiations" shall mean alpha and beta particles, electrons, protons, neutrons, gamma and X-ray and all other radiations which produce ionizations directly or indirectly, but does not include electromagnetic radiations other than gamma and X-ray.

[22 FR 3657, May 24, 1957, as amended at 26 FR 8885, Sept. 21, 1961. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.58 Occupations involved in the operation of power-driven hoisting apparatus (Order 7).

(a) *Finding and declaration of fact.* The following occupations involved in the operation of power-driven hoisting apparatus are particularly hazardous for minors between 16 and 18 years of age:

(1) Work of operating an elevator, crane, derrick, hoist, or high-lift truck, except operating an unattended automatic operation passenger elevator or an electric or air-operated hoist not exceeding one ton capacity.

(2) Work which involves riding on a manlift or on a freight elevator, except a freight elevator operated by an assigned operator.

(3) Work of assisting in the operation of a crane, derrick, or hoist performed by crane hookers, crane chasers, hookers-on, riggers, rigger helpers, and like occupations.

(b) *Definitions.* As used in this section:

(1) The term "elevator" shall mean any power-driven hoisting or lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction. The term shall include both passenger and freight elevators (including portable elevators or tiering machines), but shall not include dumbwaiters.

(2) The term "crane" shall mean a power-driven machine for lifting and lowering a load and moving it horizontally, in which the hoisting mechanism is an integral part of the machine. The term shall include all types of cranes, such as cantilever gantry, crawler, gantry, hammerhead, ingot-pouring, jib, locomotive, motor-truck, overhead traveling, pillar jib, pintle, portal, semi-gantry, semi-portal, storage bridge, tower, walking jib, and wall cranes.

(3) The term "derrick" shall mean a power-driven apparatus consisting of a mast or equivalent members held at the top by guys or braces, with or without a boom, for use with an hoisting mechanism or operating ropes. The term shall include all types of derricks, such as A-frame, breast, Chicago boom, gin-pole, guy and stiff-leg derrick.

(4) The term "hoist" shall mean a power-driven apparatus for raising or lowering a load by the application of a pulling force that does not include a car or platform running in guides. The term shall include all types of hoists, such as base mounted electric, clevis suspension, hook suspension, monorail, overhead electric, simple drum and trolley suspension hoists.

(5) The term "high-lift truck" shall mean a power-driven industrial type of truck used for lateral transportation that is equipped with a power-operated lifting device usually in the form of a fork or platform capable of tiering loaded pallets or skids one above the other. Instead of a fork or platform, the lifting device may consist of a ram, scoop, shovel, crane, revolving fork, or other attachments for handling specific loads. The term shall mean and include highlift trucks known under such names as fork lifts, fork trucks, fork-lift trucks, tiering trucks, or stacking trucks, but shall not mean low-lift trucks or low-lift platform trucks that are designed for the transportation of but not the tiering of material.

(6) The term "manlift" shall mean a device intended for the conveyance of persons which consists of platforms or brackets mounted on, or attached to, an endless belt, cable, chain or similar method of suspension; such belt, cable or chain operating in a substantially vertical direction and being supported by and driven through pulleys, sheaves or sprockets at the top and bottom.

(c) *Exception.* (1) This section shall not prohibit the operation of an automatic elevator and an automatic signal operation elevator provided that the exposed portion of the car interior (exclusive of vents and other necessary small openings), the car door, and the hoistway doors are constructed of solid surfaces without any opening through which a part of the body may extend; all hoistway openings at floor level have doors which are interlocked with the car door so as to prevent the car from starting until all such doors are closed and locked; the elevator (other than hydraulic elevators) is equipped with a device which will stop and hold the car in case of overspeed or if the cable slackens or breaks; and the elevator is equipped with upper and lower travel limit devices which will normally bring the car to rest at either terminal and a final limit switch which will prevent the movement in either direction and will open in case of excessive over travel by the car.

(2) For the purpose of this exception the term "automatic elevator" shall mean a passenger elevator, a freight elevator, or a combination passenger-freight elevator, the operation of which is controlled by pushbuttons in such a manner that the starting, going to the landing selected, leveling and holding, and the opening and closing of the car and hoistway doors are entirely automatic.

(3) For the purpose of this exception, the term "automatic signal operation elevator" shall mean an elevator which is started in response to the operation of a switch (such as a lever or pushbutton) in the car which when operated by the operator actuates a starting device that automatically closes the car and hoistway doors—from this point on, the movement of the car to the landing selected, leveling and holding when it gets there, and the opening of the car and hoistway doors are entirely automatic.

[16 FR 7008, July 20, 1951, as amended at 20 FR 6386, Aug. 31, 1955. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963; 32 FR 15479, Nov. 7, 1967. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.59 Occupations involved in the operations of power-driven metal forming, punching, and shearing machines (Order 8).

(a) *Finding and declaration of fact.* The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven metal forming, punching, and shearing machines:

(i) All rolling machines, such as beading, straightening, corrugating, flanging, or bending rolls; and hot or cold rolling mills.

(ii) All pressing or punching machines, such as punch presses except those provided with full automatic feed and ejection and with a fixed barrier guard to prevent the hands or fingers of the operator from entering the area between the dies; power presses; and plate punches.

(iii) All bending machines, such as apron brakes and press brakes.

(iv) All hammering machines, such as drop hammers and power hammers.

(v) All shearing machines, such as guillotine or squaring shears; alligator shears; and rotary shears.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those with automatic feed and ejection.

(b) *Definitions.* (1) The term "operator" shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term "helper" shall mean a person who assists in the operation of a machine covered by this section by

helping place materials into or remove them from the machine.

(3) The term "forming, punching, and shearing machines" shall mean power-driven metal-working machines, other than machine tools, which change the shape of or cut metal by means of tools, such as dies, rolls, or knives which are mounted on rams, plungers, or other moving parts. Types of forming, punching, and shearing machines enumerated in this section are the machines to which the designation is by custom applied.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[16 FR 7008, July 20, 1951, as amended at 25 FR 9848, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Further redesignated at 36 FR 25156, Dec. 29, 1971]

§ 570.60 Occupations in connection with mining, other than coal (Order 9).

(a) *Finding and declaration of fact.* All occupations in connection with mining, other than coal, are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being and employment in such occupations is therefore prohibited under section 12 of the Fair Labor Standards Act, as amended, except the following:

(1) Work in offices, in the warehouse or supply house, in the change house, in the laboratory, and in repair or maintenance shops not located underground.

(2) Work in the operation and maintenance of living quarters.

(3) Work outside the mine in surveying, in the repair and maintenance of roads, and in general clean-up about the mine property such as clearing brush and digging drainage ditches.

(4) Work of track crews in the building and maintaining of sections of railroad track located in those areas of open-cut metal mines where mining and haulage activities are not being conducted at the time and place that such building and maintenance work is being done.

(5) Work in or about surface placer mining operations other than placer dredging operations and hydraulic placer mining operations.

(6) The following work in metal mills other than in mercury-recovery mills or mills using the cyanide process:

(i) Work involving the operation of jigs, sludge tables, flotation cells, or drier-filters;

(ii) Work of hand-sorting at picking table or picking belt;

(iii) General clean-up work:

Provided, however, That nothing in this section shall be construed as permitting employment of minors in any occupation prohibited by any other hazardous occupations order issued by the Secretary of Labor.

(b) *Definitions.* As used in this section: The term "all occupations in connection with mining, other than coal" shall mean all work performed underground in mines and quarries; on the surface at underground mines and underground quarries; in or about open-cut mines, open quarries, clay pits, and sand and gravel operations; at or about placer mining operations; at or about dredging operations for clay, sand or gravel; at or about bore-hole mining operations; in or about all metal mills, washer plants, or grinding mills reducing the bulk of the extracted minerals; and at or about any other crushing, grinding, screening, sizing, washing or cleaning operations performed upon the extracted minerals except where such operations are performed as a part of a manufacturing process. The term shall not include work performed in subsequent manufacturing or processing operations, such as work performed in smelters, electro-metallurgical plants, refineries reduction plants, cement mills, plants where quarried stone is cut, sanded and further processed, or plants manufacturing clay glass or ceramic products. Neither shall the term include work performed in connection with coal mining, in petroleum production, in natural-gas production, nor in dredging operations which are not a part of mining operations, such as dredging for construction or navigation purposes.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at

28 FR 3449, Apr. 9, 1963. Further redesignated at 36 FR 25156, Dec. 29, 1971]

§ 570.61 Occupations involving slaughtering, meat packing or processing, or rendering (Order 10).

(a) *Finding and declaration of fact.* The following occupations in or about slaughtering and meat packing establishments, rendering plants, or wholesale, retail or service establishments are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being:

(1) All occupations on the killing floor, in curing cellars, and in hide cellars, except the work of messengers, runners, handtruckers, and similar occupations which require entering such workrooms or workplaces infrequently and for short periods of time.

(2) All occupations involved in the recovery of lard and oils, except packaging and shipping of such products and the operation of lard-roll machines.

(3) All occupations involved in tankage or rendering of dead animals, animal offal, animal fats, scrap meats, blood, and bones into stock feeds, tallow, inedible greases, fertilizer ingredients, and similar products.

(4) All occupations involved in the operation or feeding of the following power-driven meat-processing machines, including setting-up, adjusting, repairing, oiling, or cleaning such machines: Meat patty forming machines, meat and bone cutting saws, knives (except bacon-slicing machines), headsplitters, and guillotine cutters; snoutpullers and jaw-pullers; skinning machines; horizontal rotary washing machines; casing-cleaning machines such as crushing, stripping, and finishing machines; grinding, mixing, chopping, and hashing machines; and presses (except belly-rolling machines).

(5) All boning occupations.

(6) All occupations that involve the pushing or dropping of any suspended carcass, half carcass, or quarter carcass.

(7) All occupations involving handlifting or hand-carrying any carcass or half carcass of beef, pork, or horse, or any quarter carcass of beef or horse.

(b) *Definitions.* As used in this section:

(1) The term "slaughtering and meat packing establishments" shall mean places in or about which cattle, calves, hogs, sheep, lambs, goats, or horses are killed, butchered, or processed. The term shall also include establishments which manufacture or process meat products or sausage casings from such animals.

(2) The term "rendering plants" shall mean establishments engaged in the conversion of dead animals, animal offal, animal fats, scrap meats, blood, and bones into stock feeds, tallow, inedible greases, fertilizer ingredients, and similar products.

(3) The term "killing floor" shall include that workroom or workplace where cattle, calves, hogs, sheep, lambs, goats, or horses are immobilized, shackled, or killed, and the carcasses are dressed prior to chilling.

(4) The term "curing cellar" shall include that workroom or workplace which is primarily devoted to the preservation and flavoring of meat by curing materials. It does not include that workroom or workplace where meats are smoked.

(5) The term "hide cellar" shall include that workroom or workplace where hides are graded, trimmed, salted, and otherwise cured.

(6) The term "boning occupations" shall mean the removal of bones from meat cuts. It shall not include work that involves cutting, scraping, or trimming meat from cuts containing bones.

(c) *Exemptions.* This section shall not apply to:

(1) The killing and processing of poultry, rabbits, or small game in areas physically separated from the killing floor.

(2) The employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[27 FR 11642, Nov. 27, 1962. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963; 28 FR 12749, Nov. 30, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.62 Occupations involved in the operation of bakery machines (Order 11).

(a) *Finding and declaration of fact.* The following occupations involved in the operation of power-driven bakery machines are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operating, assisting to operate, or setting up, adjusting, repairing, oiling, or cleaning any horizontal or vertical dough mixer; batter mixer; bread dividing, rounding, or molding machine; dough brake; dough sheeter; combination bread slicing and wrapping machine; or cake cutting band saw.

(2) The occupation of setting up or adjusting a cooky or cracker machine.

[17 FR 5610, June 21, 1952, as amended at 25 FR 9849, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3449, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.63 Operations involved in the operation of paper-products machines (Order 12).

(a) *Findings and declaration of fact.* The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operating or assisting to operate any of the following power-driven paper-products machines:

(i) Arm-type wire stitcher or stapler, circular or band saw, corner cutter or mitering machine, corrugating and single-or-double-facing machine, envelope die-cutting press, guillotine paper cutter or shear, horizontal bar scorer, laminating or combining machine, sheeting machine, scrap-paper baler, or vertical slotter.

(ii) Platen die-cutting press, platen printing press, or punch press which involves hand feeding of the machine.

(2) The occupations of setting up, adjusting, repairing, oiling, or cleaning these machines including those which do not involve hand feeding.

(b) *Definitions.* (1) The term "operating or assisting to operate" shall mean all work which involves starting or stopping a machine covered by this section, placing materials into or removing them from the machine, or any other work directly involved in operating the machine.

(2) The term "paper-products machine" shall mean power-driven machines used in the remanufacture or conversion of paper or pulp into a finished product. The term is understood to apply to such machines whether they are used in establishments that manufacture converted paper or pulp products, or in any other type of manufacturing or non-manufacturing establishment.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[19 FR 5086, Aug. 12, 1954, as amended at 25 FR 9849, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.64 Occupations involved in the manufacture of brick, tile, and kindred products (Order 13).

(a) *Findings and declaration of fact.* The following occupations involved in the manufacture of clay construction products and of silica refractory products are particularly hazardous for the employment of minors between 16 and 18 years of age, and detrimental to their health and well-being.

(1) All work in or about establishments in which clay construction products are manufactured, except (i) work in storage and shipping: (ii) work in offices, laboratories, and storerooms; and (iii) work in the drying departments of plants manufacturing sewer pipe.

(2) All work in or about establishments in which silica brick or other silica refractories are manufactured, except work in offices.

(3) Nothing in this section shall be construed as permitting employment of minors in any occupation prohibited by any other hazardous occupations order issued by the Secretary of Labor.

(b) *Definitions.* (1) The term "clay construction products" shall mean the following clay products: Brick, hollow structural tile, sewer pipe and kindred products, refractories, and other clay products such as architectural terra cotta, glazed structural tile, roofing tile, stove lining, chimney pipes and tops, wall coping, and drain tile. The term shall not include the following non-structural-bearing clay products: Ceramic floor and wall tile, mosaic tile, glazed and enameled tile, faience, and similar tile, nor shall the term include non-clay construction products such as sand-lime brick, glass brick, or non-clay refractories.

(2) The term "silica brick or other silica refractories" shall mean refractory products produced from raw materials containing free silica as their main constituent.

[21 FR 5773, Aug. 2, 1956, as amended at 23 FR 6240, Aug. 14, 1958. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.65 Occupations involved in the operations of circular saws, band saws, and guillotine shears (Order 14).

(a) *Findings and declaration of fact.* The following occupations are particularly hazardous for the employment of minors between 16 and 18 years of age:

(1) The occupations of operator of or helper on the following power-driven fixed or portable machines except machines equipped with full automatic feed and ejection:

(i) Circular saws.

(ii) Band saws.

(iii) Guillotine shears.

(2) The occupations of setting-up, adjusting, repairing, oiling, or cleaning circular saws, band saws, and guillotine shears.

(b) *Definitions.* (1) The term "operator" shall mean a person who operates a machine covered by this section by performing such functions as starting or stopping the machine, placing materials into or removing them from the machine, or any other functions directly involved in operation of the machine.

(2) The term "helper" shall mean a person who assists in the operation of a machine covered by this section by helping place materials into or remove them from the machine.

(3) The term "machines equipped with full automatic feed and ejection" shall mean machines covered by this Order which are equipped with devices for full automatic feeding and ejection and with a fixed barrier guard to prevent completely the operator or helper from placing any part of his body in the point-of-operation area.

(4) The term "circular saw" shall mean a machine equipped with a thin steel disc having a continuous series of notches or teeth on the periphery, mounted on shafting, and used for sawing materials.

(5) The term "band saw" shall mean a machine equipped with an endless steel band having a continuous series of notches or teeth, running over wheels or pulleys, and used for sawing materials.

(6) The term "guillotine shear" shall mean a machine equipped with a movable blade operated vertically and used to shear materials. The term shall not include other types of shearing machines, using a different form of shearing action, such as alligator shears or circular shears.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[25 FR 9849, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.66 Occupations involved in wrecking, demolition, and shipbreaking operations (Order 15).

(a) *Finding and declaration of fact.* All occupations in wrecking, demolition, and shipbreaking operations are particularly hazardous for the employment of minors between 16 and 18 years of age and detrimental to their health and well-being.

(b) *Definition.* The term "wrecking, demolition, and shipbreaking operations" shall mean all work, including clean-up and salvage work, performed at the site of the total or partial razing, demolishing, or dismantling of a building, bridge, steeple, tower, chimney, other structure, ship or other vessel.

[25 FR 9850, Oct. 14, 1960. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at

28 FR 3450, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.67 Occupations in roofing operations (Order 16).

(a) *Finding and declaration of fact.* All occupations in roofing operations are particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health.

(b) *Definition of "roofing operations".* The term "roofing operations" shall mean all work performed in connection with the application of weatherproofing materials and substances (such as tar or pitch, asphalt prepared paper, tile, slate, metal, translucent materials, and shingles of asbestos, asphalt or wood) to roofs of buildings or other structures. The term shall also include all work performed in connection with: (1) The installation of roofs, including related metal work such as flashing and (2) alterations, additions, maintenance, and repair, including painting and coating, of existing roofs. The term shall not include gutter and downspout work; the construction of the sheathing or base of roofs; or the installation of television antennas, air conditioners, exhaust and ventilating equipment, or similar appliances attached to roofs.

(c) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[27 FR 102, Jan. 5, 1962. Redesignated at 28 FR 1634, Feb. 21, 1963, and amended at 28 FR 3450, Apr. 9, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.68 Occupations in excavation operations (Order 17).

(a) *Finding and declaration of fact.* The following occupations in excavation operations are particularly hazardous for the employment of persons between 16 and 18 years of age:

(1) Excavating, working in, or backfilling (refilling) trenches, except (i) manually excavating or manually backfilling trenches that do not exceed four feet in depth at any point, or (ii) working in trenches that do not exceed four feet in depth at any point.

(2) Excavating for buildings or other structures or working in such excavations, except (i) manually excavating to a depth not exceeding four feet below any ground surface adjoining the excavation, or (ii) working in an excavation not exceeding such depth, or (iii) working in an excavation where the side walls are shored or sloped to the angle of repose.

(3) Working within tunnels prior to the completion of all driving and shoring operations.

(4) Working within shafts prior to the completion of all sinking and shoring operations.

(b) *Exemptions.* This section shall not apply to the employment of apprentices or student-learners under the conditions prescribed in § 570.50 (b) and (c).

[28 FR 3449, Apr. 9, 1963. Redesignated at 36 FR 25156, Dec. 29, 1971]

Subpart E-1—Occupations in Agriculture Particularly Hazardous for the Employment of Children Below the Age of 16

AUTHORITY: Secs. 12, 13, 18, 52 Stat. 1067, 1069, as amended; 29 U.S.C. 212, 213, 218.

SOURCE: 35 FR 221, Jan. 7, 1970, unless otherwise noted. Redesignated at 36 FR 25156, Dec. 29, 1971.

§ 570.70 Purpose and scope.

(a) *Purpose.* Section 13(c)(2) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 213(c)(2)) states that the "provisions of section 12 [of the Act] relating to child labor shall apply to an employee below the age of 16 employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of 16, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person." The purpose of this subpart is to apply this statutory provision.

(b) *Exception.* This subpart shall not apply to the employment of a child below the age of 16 by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(c) *Statutory definitions.* As used in this subpart, the terms "agriculture," "employer," and "employ" have the same meanings as the identical terms contained in section 3 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203), which are as follows:

(1) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(2) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State or a political subdivision thereof, employed (i) in a hospital, institution, or school referred to in the last sentence of section (r) of the Act, or (ii) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (iii) "Employ" includes to suffer or permit to work.

[35 FR 221, Jan. 7, 1970, as amended at 35 FR 2822, Feb. 11, 1970. Redesignated at 36 FR 25156, Dec. 29, 1971]

§ 570.71 Occupations involved in agriculture.

(a) *Findings and declarations of fact as to specific occupations.* The following occupations in agriculture are particularly hazardous for the employment of children below the age of 16:

(1) Operating a tractor of over 20 PTO horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor.

(2) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines:

(i) Corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, or mobile pea viner;

(ii) Feed grinder, crop dryer, forage blower, auger conveyor, or the unloading mechanism of a nongravity-type self-unloading wagon or trailer; or

(iii) Power post-hole digger, power post driver, or nonwalking type rotary tiller.

(3) Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) any of the following machines:

(i) Trencher or earthmoving equipment;

(ii) Fork lift;

(iii) Potato combine; or

(iv) Power-driven circular, band, or chain saw.

(4) Working on a farm in a yard, pen, or stall occupied by a:

(i) Bull, boar, or stud horse maintained for breeding purposes; or

(ii) Sow with suckling pigs, or cow with newborn calf (with umbilical cord present)

(5) Felling, bucking, skidding, loading, or unloading timber with butt diameter of more than 6 inches.

(6) Working from a ladder or scaffold (painting, repairing, or building structures, pruning trees, picking fruit, etc.) at a height of over 20 feet.

(7) Driving a bus, truck, or automobile when transporting passengers, or riding on a tractor as a passenger or helper.

(8) Working inside:

(i) A fruit, forage, or grain storage designed to retain an oxygen deficient or toxic atmosphere;

(ii) An upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position;

(iii) A manure pit; or

(iv) A horizontal silo while operating a tractor for packing purposes.

(9) Handling or applying (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flagman for aircraft applying) agricultural chemicals classified under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 135 et seq.) as Category I of toxicity, identified by the word "poison" and the "skull and crossbones" on the label; or Category II of toxicity, identified by the word "warning" on the label;

(10) Handling or using a blasting agent, including but not limited to, dynamite, black powder, sensitized ammonium nitrate, blasting caps, and primer cord; or

(11) Transporting, transferring, or applying anhydrous ammonia.

(b) *Occupational definitions.* In applying machinery, equipment, or facility terms used in paragraph (a) of this section, the Wage and Hour Division will be guided by the definitions contained in the current edition of "Agricultural Engineering", a dictionary and handbook, Interstate Printers and Publishers, Danville, Ill. Copies of this dictionary and handbook are available for examination in Regional Offices of the Wage and Hour Division, U.S. Department of Labor.

§ 570.72 Exemptions.

(a) *Student-learners.* The findings and declarations of fact in § 570.71(a) shall not apply to the employment of any child as vocational agriculture student-learner in any of the occupations described in paragraph (1), (2), (3), (4), (5), or (6) of § 570.71(a) when each of the following requirements are met: (1) The student-learner is enrolled in a vocational education training program in agriculture under a recognized State or local educational authority, or in a substantially similar program conducted by a private school; (2) such student-learner is employed under a written agreement which provides; (i) that the work of the student-learner is incidental to his training; (ii) that such work shall be intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person; (iii) that safety instruction shall be given by the school and correlated by the employer with on-the-job training; and (iv) that a schedule of organized and progressive work processes to be performed on the job have been prepared; (3) such written agreement contains the name of the student-learner, and is signed by the employer and by a person authorized to represent the educational authority or school; and (4) copies of each such agreement are kept on file by both the educational authority or school and by the employer.

(b) *Federal Extension Service.* The findings and declarations of fact in § 570.71(a) shall not apply to the employment of a child under 16 years of age in those occupations in which he has successfully completed one or more training programs described in paragraph (b) (1), (2), or (3) of this section provided he has been instructed by his employer on safe and proper operation of the specific equipment he is to use; is continuously and closely supervised by the employer where feasible; or, where not feasible, in work such as cultivating, his safety is checked by the employer at least at midmorning, noon, and midafternoon.

(1) *4-H tractor operation program.* The child is qualified to be employed in an occupation described in paragraph (1) of § 570.71(a) provided:

(i) He is a 4-H member;

(ii) He is 14 years of age, or older;

(iii) He is familiar with the normal working hazards in agriculture;

(iv) He has completed a 10-hour training program which includes the following units from the manuals of the 4-H tractor program conducted by, or in accordance with the requirements of, the Cooperative Extension Service of a land grant university:

(*a*) First-Year Manual:

Unit 1—Learning How to be Safe;
Unit 4—The Instrument Panel;
Unit 5—Controls for Your Tractor;
Unit 6—Daily Maintenance and Safety Check; and
Unit 7—Starting and Stopping Your Tractor;

(*b*) Second-year Manual:

Unit 1—Tractor Safety on the Farm;

(c) Third-Year Manual:
Unit 1—Tractor Safety on the Highway;
Unit 3—Hitches, Power-take-off, and Hydraulic Controls;

(v) He has passed a written examination on tractor safety and has demonstrated his ability to operate a tractor safely with a two-wheeled trailed implement on a course similar to one of the 4-H Tractor Operator's Contest Courses; and

(vi) His employer has on file with the child's records kept pursuant to Part 516 of this title (basically, name, address, and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the leader who conducted the training program and by an Extension Agent of the Cooperative Extension Service of a land grant university to the effect that the child has completed all the requirements specified in paragraphs (b) (1) (i) through (v) of this section.

(2) *4-H machine operation program.* The child is qualified to be employed in an occupation described in paragraph (2) of § 570.71(a) providing:

(i) He satisfies all the requirements specified in paragraphs (b)(2) (i) through (v) of this section;

(ii) He has completed an additional 10-hour training program on farm machinery safety, including 4-H Fourth-Year Manual, Unit 1, Safe Use of Farm Machinery;

(iii) He has passed a written and practical examination on safe machinery operation; and

(iv) His employer has on file with the child's records kept pursuant to Part 516 of this title (basically, name, address, and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the leader who conducted the training program and by an Extension Agent of the Cooperative Extension Service of a land grant university, to the effect that the child has completed all of the requirements specified in paragraphs (b)(2) (i) through (iii) of this section.

(3) *Tractor and machine operation program.* The child is qualified to be employed in an occupation described in paragraphs (1) and (2) of § 570.71(a) providing:

(i) He is 14 years of age, or older;

(ii) He has completed a 4-hour orientation course familiarizing him with the normal working hazards in agriculture;

(iii) He has completed a 20-hour training program on safe operation of tractors and farm machinery, which covers all material specified in paragraphs (b)(1)(iv) and (2)(ii) of this section.

(iv) He has passed a written examination on tractor and farm machinery safety, and has demonstrated his ability to operate a tractor with a two-wheeled trailed implement on a course similar to a 4-H Tractor Operator's Contest Course, and to operate farm machinery safely.

(v) His employer has on file with the child's records kept pursuant to Part 516 of this title (basically, name, address and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the volunteer leader who conducted the training program and by an Extension Agent of the Cooperative Extension Service of a land grant university, to the effect that all of the requirements of paragraphs (b)(2) (i) through (iv) of this section have been met.

(c) *Vocational agriculture training.* The findings and declarations of fact in § 570.71(a) shall not apply to the employment of a vocational agriculture student under 16 years of age in those occupations in which he has successfully completed one or more training programs described in paragraph (c) (1) or (2) of this section and who has been instructed by his employer in the safe and proper operation of the specific equipment he is to use, who is continuously and closely supervised by his employer where feasible or, where not feasible, in work such as cultivating, whose safety is checked by the employer at least at midmorning, noon, and midafternoon, and who also satisfies whichever of the following program requirements are pertinent:

(1) *Tractor operation program.* The student is qualified to be employed in an occupation described in paragraph (1) of § 570.71(a) provided:

(i) He is 14 years of age, or older;

(ii) He is familiar with the normal working hazards in agriculture;

(iii) He has completed a 15-hour training program which includes the required units specified in the Vocational Agriculture Training Program in Safe Tractor Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare and acceptable by the U.S. Department of Labor. The training program is outlined in Special Paper No. 8, April 1969, prepared at Michigan State University, East Lansing, Mich., for the Office of Education. Copies of this training program outline are available for examination in the Regional Offices of the Wage and Hour Division, U.S. Department of Labor, and a copy may be obtained from the Office of Education, U.S. Department of Health, Education, and Welfare, Washington, D.C. 20202.

(iv) He has passed both a written test and a practical test on tractor safety including a demonstration of his ability to operate safely a tractor with a two-wheeled trailed implement on a test course similar to that described in the Vocational Agriculture Training Program in Safe Tractor Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare; and

(v) His employer has on file with the child's records kept pursuant to Part 516 of this title (basically, name, address, and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the Vocational Agriculture teacher who conducted the program to the effect that the student has completed all the requirements specified in paragraphs (c)(1) (i) through (iv) of this section.

(2) *Machinery operation program.* The student is qualified to be employed in an occupation described in paragraph (2) of § 570.71(a) provided he has completed the Tractor Operation Program described in paragraph (c)(1) of this section and:

(i) He has completed an additional 10-hour training program which includes the required units specified in the Vocational Agriculture Training Program in Safe Farm Machinery Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare and approved by the U.S. Department of Labor;

(ii) He has passed both a written test and a practical test on safe machinery operation similar to that described in the Vocational Agriculture Training Program in Safe Farm Machinery Operation, outlined by the Office of Education, U.S. Department of Health, Education, and Welfare; and

(iii) His employer has on file with the child's records kept pursuant to Part 516 of this title (basically, name, address and date of birth) a copy of a certificate acceptable by the Wage and Hour Division, signed by the Vocational Agriculture teacher who conducted the program to the effect that student has completed all the requirements specified in paragraphs (c)(2) (i) and (ii) of this section.

(d) *Agency review.* The provisions of paragraphs (a), (b), and (c) of this section will be reviewed and reevaluated before January 1, 1972. In addition, determinations will be made as to whether the use of protective frames, crush resistant cabs, and other personal protective devices should be made a condition of these exemptions.

Subpart F—[Reserved]

Subpart G—General Statements of Interpretation of the Child Labor Provisions of the Fair Labor Standards Act of 1938, as Amended

AUTHORITY: 52 Stat. 1060-1069, as amended; 29 U.S.C. 201-219.

GENERAL

§ 570.101 Introductory statement.

(a) This subpart discusses the meaning and scope of the child labor provisions contained in the Fair Labor Standards Act, as amended (hereinafter referred to as the act). These provisions seek to protect the safety, health, well-being, and opportunities for schooling of youthful workers and authorize the Secretary of Labor to issue legally binding orders or regulations in certain instances and under certain conditions. The child labor provisions are found in sections 3(1), 11(b), 12, 13 (c) and (d), 15(a)(4), 16(a), and 18 of the act. They are administered and enforced by the Secretary of

Labor who has delegated to the Wage and Hour Division the duty of making investigations to obtain compliance, and of developing standards for the issuance of regulations and orders relating to (1) hazardous occupations, (2) employment of 14- and 15-year-old children, and (3) age certificates.

(b) The interpretations of the Secretary contained in this subpart indicate the construction of the law which will guide him in performing his duties until he is directed otherwise by authoritative rulings of the courts or until he shall subsequently decide that his prior interpretation is incorrect.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.102 General scope of statutory provisions.

The most important of the child labor provisions are contained in sections 12(a), 12(c), and 3(l) of the act. Section 12(a) provides that no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any goods produced in an establishment in or about which oppressive child labor was employed within 30 days before removal of the goods. The full text of this subsection is set forth in § 570.104 and its terms are discussed in §§ 570.105 to 570.111, inclusive. Section 12(c) prohibits any employer from employing oppressive child labor in interstate or foreign commerce or in the production of goods for such commerce. The text and discussion of this provision appear in §§ 570.112 and 570.113. Section 3(l) of the act, which defines the term "oppressive child labor," is set forth in § 570.117 and its provisions are discussed in §§ 570.118 to 570.121, inclusive. It will further be noted that the act provides various specific exemptions from the foregoing provisions which are set forth and discussed in §§ 570.122 to 570.126, inclusive.

§ 570.103 Comparison with wage and hour provisions.

A comparison of the child labor provisions with the so-called wage and hours provisions contained in the act discloses some important distinctions which should be mentioned.

(a) The child labor provisions contain no requirements in regard to wages. The wage and hours provisions, on the other hand, provide for minimum rates of pay for straight time and overtime pay at a rate not less than one and one-half times the regular rate of pay for overtime hours worked. Except as provided in certain exemptions contained in the act, these rates are required to be paid all employees subject to the wage and hours provisions, regardless of their age or sex. The fact therefore, that the employment of a particular child is prohibited by the child labor provisions or that certain shipments or deliveries may be proscribed on account of such employment, does not relieve the employer of the duties imposed by the wage and hours provisions to compensate the child in accordance with those requirements.

(b) There are important differences between the child labor provisions and the wage and hours provisions with respect to their general coverage. As pointed out in § 570.114, two separate and basically different coverage provisions are contained in section 12 relating to child labor. One of these provisions (section 12(c)), which applies to the employment by an employer of oppressive child labor in commerce or in the production of goods for commerce, is similar to the wage and hours coverage provisions, which include employees engaged in commerce or in the production of goods for commerce or employed in enterprises having employees so engaged. The other provision (section 12(a)), however, differs fundamentally in its basic concepts of coverage from the wage and hours provisions, as will be explained in §§ 570.104 to 570.111.

(c) Another distinction is that the exemptions provided by the act from the minimum wage and/or overtime provisions are more numerous and differ from the exemptions granted from the child labor provisions. There are only four specific child labor exemptions of which only one applies to the minimum wage and overtime pay requirements as well. This is the exemption for employees engaged in the delivery of newspapers to the consumer.[3] With this exception, none of the specific exemptions from the minimum wage and/or overtime pay requirements applies to the child labor provisions. However, it should be noted that the exclusion of certain employers by section 3(d)[4] of the act applies to the child labor provisions as well as the wage and hours provisions.

[16 FR 7008, July 20, 1951. Redesignated at 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

COVERAGE OF SECTION 12(a)

§ 570.104 General.

Section 12(a) of the act provides as follows:

> No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: *And provided further*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

In determining the applicability of this provision, consideration of the meaning of the terms used is necessary. These terms are discussed in §§ 570.105 to 570.111, inclusive.

§ 570.105 "Producer, manufacturer, or dealer".

It will be observed that the prohibition of section 12(a) with respect to certain shipments or deliveries for shipment is confined to those made by producers, manufacturers, and dealers. The terms "producer, manufacturer, or dealer" used in this provision are not expressly defined by the statute. However, in view of the definition of "produced" in section 3(j), for purposes of this section a "producer" is considered to be one who engages in producing, manufacturing, handling or in any other manner working on goods in any State.[5] Since manufacturing is considered a specialized form of production, the word "manufacturer" does not have as broad an application as the word "producer." Manufacturing generally involves the transformation of raw materials or semifinished goods into new or different articles. A person may be considered a "manufacturer" even though his goods are made by hand, as is often true of products made by homeworkers. Moreover, it is immaterial whether manufacturing is his sole or main business. Thus, the term includes retailers who, in addition to retail selling, engage in such manufacturing activities as the making of slip-covers or curtains, the baking of bread, the making of candy, or the making of window frames. The word "dealer" refers to anyone who deals in goods (as defined in section 3(i) of the act),[6] including persons engaged in buying, selling, trading, distributing, delivering, etc. It includes middlemen, factors, brokers, commission merchants, wholesalers, retailers and the like.

§ 570.106 "Ship or deliver for shipment in commerce".

(a) Section 12(a) forbids producers, manufacturers, and dealers to "ship or deliver for shipment in commerce" the goods referred to therein. A producer, manufacturer, or dealer may "ship" goods in commerce either by moving

---

[3] Section 13(d) of the act.

[4] Section 13(d) defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization".

[5] For a discussion of the definition of "produced" as it relates to section 12(a), see § 570.108.

[6] See § 570.107.

BEST DOCUMENT AVAILABLE

them himself in interstate or foreign commerce or by causing them to so move, as by delivery to a carrier.[7] Thus, a baker "ships" his bread in commerce whether he carries it in his own truck across State lines or sends it by contract or common carrier to his customers in other States. The word "ship" must be applied in its ordinary meaning. For example, it does not apply to the transmission of telegraphic messages.[8]

(b) To "deliver for shipment in commerce" means to surrender the custody of goods to another under such circumstances that the person surrendering the goods knows or has reason to believe that the goods will later be shipped in commerce.[9] Typical is the case of a Detroit manufacturer who delivers his goods in Detroit to a distributor who, as the manufacturer is well aware, will ship the goods into another State. A delivery for shipment in commerce may also be made where raw materials are delivered by their producer to a manufacturer in the same State who converts them into new products which are later shipped across State lines. If the producer in such case is aware or has reason to believe that the finished products will ultimately be sent into another State, his delivery of the raw materials to the manufacturer is a delivery for shipment in commerce. Another example is a paper box manufacturer who ships a carton of boxes to a fresh fruit or vegetable packing shed within the same State, with knowledge or reason to believe that the boxes will there be filled with fruits or vegetables and shipped outside the State. In such case the box manufacturer has delivered the boxes for shipment in commerce.

§ 570.107 "Goods".[10]

(a) Section 12(a) prohibits the shipment or delivery for shipment in commerce of "any goods" produced in an establishment which were removed within 30 days of the employment there of oppressive child labor. It should be noted that the statute does not base the prohibition of section 12(a) upon the percentage of an establishment's output which is shipped in commerce.

(b) The act furnishes its own definition of "goods" in section 3(i), as follows:

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

The term includes such things as foodstuffs, clothing, machinery, printed materials, blueprints and also includes intangibles such as news, ideas, and intelligence. The statute expressly excludes goods after their delivery into the actual physical possession of an ultimate consumer other than a producer, manufacturer, or processor thereof. Accordingly, such a consumer may lawfully ship articles in his possession although they were ineligible for shipments (commonly called "hot goods") before he received them.[11]

§ 570.108 "Produced".

The word "produced" as used in the act is defined by section 3(j) to mean:

---

[7] Section 3(b) of the act defines "commerce" to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

[8] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490.

[9] Tobin v. Grant, N. D. Calif., 79 Sup. 975 which was a suit for injunction by the Secretary of Labor against a manufacturer of books and book covers employing oppressive child labor. The facts showed that the manufactured articles sold by defendant to purchasers in the same State had an ultimate out-of-State destination which was manifest to defendant. The court construed the words "deliver for shipment in commerce" as sufficiently broad to cover this situation even though the purchasers acquired title to the goods.

[10] The term "goods" is discussed in more detail in Part 776 of this title (Interpretative Bulletin on the coverage of the wage and hours provisions) issued by the Administrator of the Wage and Hour Division.

[11] For a discussion of the exclusionary clause in section 3(i) of the act, see Powell et al. v. United States Cartridge Co., 70 S. CT. 755.

* * * produced, manufactured, mined, handled, or in any other manner worked on in any state; * * *[12]

(a) The prohibition of section 12(a) cannot apply to a shipment of goods unless those goods (including any part or ingredient thereof) were actually "produced" in and removed from an establishment where oppressive child labor was employed. This provision is applicable even though the under-age employee does not engage in the production of the goods themselves if somewhere in the establishment in or about which he is employed goods are "produced" which are subsequently shipped or delivered for shipment in commerce. In contrast to this restrictive requirement of section 12(a), it will be noted that the employees covered under the wage and hours provisions as engaged in the production of goods for commerce are not limited to those in or about establishments where such goods are being produced. If the requisite relationship[13] to production of such goods is present, an employee is covered for wage and hours purposes regardless of whether his work brings him in or near any establishment where the goods are produced.[14]

(b) Since the first word in the definition of "produced" repeats the term being defined, it seems clear that the first word must carry the meaning that it has in everyday language. Goods are commonly spoken of as "produced" if they have been brought into being as a result of the application of work. The words "manufactured" and "mined" in the definition refer to special forms of production. The former term is generally applied to the products of industry where existing raw materials are transformed into new or different articles by the use of industrial methods, either by the aid of machinery or by manual operations. Mining is a type of productive activity involving the taking of materials from the ground, such as coal from a coal mine, oil from oil wells, or stone from quarries. The statute also defines the term "produced" to mean "handled" or "in any other manner work on."[15] These words relate not only to operations carried on in the course of manufacturing, mining, or production as commonly described, but include as well all kinds of operations which prepare goods for their entry into the stream of commerce, without regard to whether the goods are to be further processed or are so-called "finished goods."[16] Accordingly, warehouses, fruit and vegetable packing sheds, distribution yards, grain elevators, etc., where goods are sorted, graded, stored, packed, labeled or otherwise handled or worked on in preparation for their shipment out of the State are producing establishments for purposes of section 12(a).[17] However, the handling or working on goods, performed by employees of carriers which accomplishes the interstate transit or movement in commerce itself, does not constitute production under the act.[18]

---

[12] The remaining portion of section 3(j) provides: " * * * and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

[13] See footnote 12.

[14] See Part 776 of this title (interpretative Bulletin on the coverage of the wage and hours provisions) issued by the Administrator of the Wage and Hour Division. Also, see §§ 570.112 and 570.113.

[15] For a more complete discussion of these words, see § 776.16 of Part 776 (bulletin on coverage of the wage and hours provisions) of Chapter V of this title.

[16] In Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, the Supreme Court stated that these words bring within the statutory definition "every step in putting the subject of commerce in a state to enter commerce," including "all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce" and "every kind of incidental operation preparatory to putting goods into the stream of commerce."

[17] Lenroot v. Kemp and Lenroot v. Hazlehurst Mercantile Co., 153 F. 2d 153 (C.A. 5), where the court directed issuance of injunctions to restrain violations of the child labor provisions by operators of vegetable packing sheds at which they bought, then washed, sorted, crated, and packed cabbage and tomatoes for shipment in interstate commerce.

§ 570.109 "Establishment situated in the United States".

(a) (1) The statute does not expressly define "establishment." Accordingly, the term should be given a meaning which is not only consistent with its ordinary usage, but also designed to accomplish the general purposes of the act. As normally used in business and in Government, the word "establishment" refers to a distinct physical place of business. This is the meaning attributed to the term as it is used in section 13(a)(2) of the act.[19] Since the establishments covered under section 12(a) of the act are those in which goods are produced, the term "establishment" there refers to a physical place where goods are produced. Typical producing establishments are industrial plants, mines, quarries, and the like. The producing establishment, however, need not have a permanently fixed location as is the case with a factory or mine. A boat, for instance, where productive activities such as catching or canning fish are carried on is considered a producing establishment for purposes of section 12(a).

(2) Frequently, questions arise as to what should be considered a single establishment. No hard and fast rule can be laid down which will fix the area of all establishments. Accordingly, a determination of the area contained in a single establishment must be based upon the facts of each individual situation. Facts which are particularly pertinent in this connection, however, are those which relate to the physical characteristics and the manner of operation and control of the business. Sometimes, an establishment may extend over an area of several square miles as is common with farms, logging enterprises, mines, and quarries. On the other hand, it may be confined to a few square feet. A typical illustration of this is a loft building that houses the workshops of hundreds of independent manufacturing firms. Each of the workshops is, for purposes of this section, a separate establishment.

(3) Similar principles are applicable in determining whether several buildings located on the same premises constitute one establishment or more than one. For example, where several factory buildings are located on the same premises and owned and operated by the same person, they are generally to be considered as a single establishment. On the other hand, factory buildings located on the same premises, but owned and operated by different persons, will not ordinarily be treated as a single establishment. Where the several factories, however, are engaged in a joint productive enterprise, they may constitute a single establishment. This is the case, for example, where a large shipyard contains the plants of a number of subcontractors who are engaged in making parts or equipment for the boats that are built in the yard.

(b) The phrase "situated in the United States" is construed to include any of the 50 States or the District of Columbia or any Territory or possession of the United States.

§ 570.110 "In or about".

(a) Section 12(a) excludes from the channels of interstate commerce goods produced in an establishment "in or about" which oppressive child labor has been employed. In a great many situations it is obviously easy to determine whether a minor is employed "in" an establishment. Thus, he is so employed where he performs his occupational duties on the premises of the producing establishment. Furthermore, a minor is also considered as employed in an establishment where he performs most of his duties off the premises but is regularly required to perform certain occupational duties in the establishment, such as loading or unloading a truck, checking in or out, or washing windows. This is true in such cases even though the minor is employed by someone other than the owner or operator of the particular establishment. On the other hand, a minor is not considered to be employed in an establishment other than his employer's merely because such establishment is visited by him for brief periods of time and for the sole purpose of picking up or delivering a message or other small article.

---

[18] Western Union Telegraph Co. v. Lenroot, 323 U.S. 490.

[19] A. H. Phillips, Inc. v. Walling, 324 U.S. 490. See Part 779 (bulletin on the retail and service establishment exemption from the wage and hours provisions) of Chapter V of this title.

(b) If, in the light of the statements in paragraph (a) of this section, the minor cannot be considered as employed in the establishment, he may, nevertheless, be employed "about" it if he performs his occupational duties sufficiently close in proximity to the actual place of production to fall within the commonly understood meaning of the term "about." This would be true in a situation where the foregoing proximity test is met and the occupation of the minor is directly related to the activities carried on in the producing establishment, in this connection, occupations are considered sufficiently related to the activities carried on in the producing establishment to meet the second test above at least where the requisite relationship to production of goods exists within the meaning of section 3(j) of the act.[20] By way of example, a driver's helper employed to assist in the distribution of the products of a bottling company who regularly boards the delivery truck immediately outside the premises of the bottling plant is considered employed "in or about" such establishment, without regard to whether he ever enters the plant itself. On the other hand, employees working entirely within one establishment are not considered to be employed "in or about" a wholly different establishment occupying separate premises and operated by another employer. This would be true even though the two establishments are contiguous. But in other situations the distance between the producing establishment and the minor's place of employment may be a decisive factor. Thus, a minor employed in clearing rights-of-way for power lines many miles away from the power plant cannot well be said to be employed "in or about" such establishment. In view of the great variety of establishments and employments, however, no hard and fast rule can be laid down which will once and for all distinguish between employments that are "about" an establishment and those that are not. Therefore, each case must be determined on its own merits. In determining whether a particular employment is "about" an establishment, consideration of the following factors should prove helpful: (1) Actual distance between the producing establishment and the minor's place of employment; (2) nature of the establishment; (3) ownership or control of the premises involved; (4) nature of the minor's activities in relation to the establishment's purpose; (5) identity of the minor's employer and the establishment's owner; (6) extent of control by the producing establishment's owner over the minor's employment.

§ 570.111 Removal "within 30 days".

According to section 12(a) goods produced in an establishment in or about which oppressive child labor has been employed are barred as "hot goods" from being shipped or delivered for shipment in commerce in the following two situations: First, if they were removed from the establishment while any oppressive child labor was still being employed in or about it; second, if they were removed from an establishment in or about which oppressive child labor was no longer employed but less than 30 days had then elapsed since any such employment of oppressive child labor came to an end. Once any goods have been removed from a producing establishment within the above-mentioned thirty-day period, they are barred at any time theafter from being shipped or delivered for shipment in commerce so long as they remain "goods" for purposes of the act.[21] Goods are considered removed from an establishment just as soon as they are taken away from the establishment as that term has been defined.[23] The statute does not require that this "removal" from the establishment be made for the purpose or in the course of a shipment or delivery for shipment in commerce. A "removal" within the meaning of the statute also takes place where the goods are removed from the establishment for some other purpose such as storage, the granting of a lien or other security interest, or further processing.

---

[20] See Part 776 (bulletin on coverage of the wage and hours provisions) of this title.

[21] However, section 12(a) contains a provision relieving innocent purchasers from liability thereunder provided certain conditions are met. For a discussion of this provision, see § 570.128.

Also, section 15(a)(1) relieves any common carrier from liability under the act for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier.

[16 FR 7008, July 20, 1951, as amended at 23 FR 6240, Aug. 14, 1958. Redesignated at 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

COVERAGE OF SECTION 12(c)

§ 570.112 General.

(a) Section 12(c) of the act provides as follows: "No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in an enterprise engaged in commerce or in the production of goods for commerce."

(b) This provision, which was added by amendments of 1949 and 1961 to the act, broadens child labor coverage to include employment in commerce. Moreover, it establishes a direct prohibition of the employment of oppressive child labor in commerce or in the production of goods for commerce. The legislative history pertaining to this provision leads to the conclusion that Congress intend its application to be generally consistent with that of wage and hours coverage provisions. The application of the provision depends on the existence of two necessary elements: (1) The employment of "oppressive child labor"[24] by some employer and (2) the employment of such oppressive child labor in activities or enterprises which are in commerce or in the production of goods for commerce within the meaning of the act.

[36 FR 25156, Dec. 29, 1971]

§ 570.113 Employment "in commerce or in the production of goods for commerce".

(a) The term "employ" is broadly defined in section 3(g) of the act to include "to suffer or permit to work." The act expressly provides that the term "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee". The nature of an employer-employee relationship is ordinarily to be determined not solely on the basis of the contractual relationship between the parties but also in the light of all the facts and circumstances. Moreover, the terms "employer" and "employ" as used in the act are broader than the common-law concept of employment and must be interpreted broadly in the light of the mischief to be corrected. Thus, neither the technical relationship between the parties nor the fact that the minor is unsupervised or receives no compensation is controlling in determining whether an employer-employee relationship exists for purposes of section 12(c) of the act. However, these are matters which should be considered along with all other facts and circumstances surrounding the relationship of the parties in arriving at such determination. The words "suffer or permit to work" include those who suffer by a failure to hinder and those who permit by acquiescence in addition to those who employ by oral or written contract. A typical illustration of employment of oppressive child labor by suffering or permitting an under-aged minor to work is that of an employer who knows that his employee is utilizing the services of such a minor as a helper or substitute in performing his employer's work. If the employer acquiesces in the practice or fails to exercise his power to hinder it, he is himself suffering or permitting the helper to work and is, therefore, employing him, within the meaning of the act. Where employment does exist within the meaning of the act, it must, of course, be in commerce or in the production of goods for commerce or in an enterprise engaged in commerce or in the production of goods for commerce in order for section 12(c) to be applicable.

---

[23] For a discussion of the meaning of "establishment," see § 570.109.

[24] "Oppressive child labor" is discussed in §§ 570.117 to 570.121, inclusive.

(b) As previously indicated, the scope of coverage of section 12(c) of the act is, in general, coextensive with that of the wage and hours provisions. The basis for this conclusion is provided by the similarity in the language used in the respective provisions and by statements appearing in the legislative history concerning the intended effect of the addition of section 12(c). Accordingly, it may be generally stated that employees considered to be within the scope of the phrases "in commerce or in the production of goods for commerce" for purposes of the wage and hours provisions are also included within the identical phrases used in section 12(c). To avoid needless repetition, reference is herein made to the full discussion of principles relating to the general coverage of the wage and hours provisions contained in Parts 776 and 779 of this chapter. In this connection, however, it should be borne in mind that lack of coverage under the wage and hours provisions or under section 12(c) does not necessarily preclude the applicability of section 12(a) of the Act.[26]

[36 FR 25156, Dec. 29, 1971]

JOINT AND SEPARATE APPLICABILITY OF SECTIONS 12(a) AND 12(c)

§ 570.114 General.

It should be noted that section 12(a) does not directly outlaw the employment of oppressive child labor. Instead, it prohibits the shipment or delivery for shipment in interstate or foreign commerce of goods produced in an establishment where oppressive child labor has been employed within 30 days before removal of the goods. Section 12(c), on the other hand, is a direct prohibition against the employment of oppressive child labor in commerce, or in the production of goods for commerce. Moreover, the two subsections provide different methods for determining the employees who are covered thereby. Thus, subsection (a) may be said to apply to young workers on an "establishment" basis. If the standards for child labor are not observed in the employment of minors in or about an establishment where goods are produced and from which such goods are removed within the statutory 30-day period, it becomes unlawful for any producer, manufacturer, or dealer (other than an innocent purchaser who is in compliance with the requirements for a good faith defense as provided in the subsection) to ship or deliver those goods for shipment in commerce. It is not necessary for the minor himself to have been employed by the producer of such goods or in their production in order for the ban to apply. On the other hand, whether the employment of a particular minor below the applicable age standard will subject his employer to the prohibition of subsection (c) is dependent upon the minor himself being employed in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in production of goods for commerce within the meaning of the act. If such a minor is so employed by his employer and is not specifically exempt from the child labor provisions then his employment under such circumstances constitutes a violation of section 12(c) regardless of where he may be employed or what his employer may do. Moreover, a violation of section 12(c) occurs under the foregoing circumstances without regard to whether there is a "removal" of goods or a shipment or delivery for shipment in commerce.

[36 FR 25157, Dec. 29, 1971]

§ 570.115 Joint applicability.

The child labor coverage provisions contained in sections 12(a) and 12(c) of the act may be jointly applicable in certain situations. For example, a manufacturer of women's dresses who ships them in interstate commerce, employs a minor under 16 years of age who gathers and bundles scraps of material in the cutting room of the plant. Since the employment of the minor under such circumstances constitutes oppressive child labor and involves the production of goods for commerce, the direct prohibition of section 12(c) is applicable to the case. In addition, section 12(a) also applies to the manufacturer if the dresses are removed from the establishment during the course of the minor's employment or within 30 days thereafter. To illustrate further, suppose that a transportation company employs a 17-year-old boy as helper on a truck used for hauling materials between railroads and the plants of its customers who are engaged in producing goods for shipment in commerce. The employment of the minor as helper on a truck is oppressive child labor because such occupation has been declared particularly hazardous by the Secretary for children between 16 and 18 years of age. Since his occupation involves the transportation of goods which are moving in interstate commerce, his employment in such occupation by the transportation company is, therefore, directly prohibited by the terms of section 12(c). If the minor's duties in this case should, for example, include loading and unloading the truck at the establishments of the customers of his employer, then the provisions of section 12(a) might be applicable with respect to such customers. This would be true where any goods which they produce and ship in commerce are removed from the producing establishment within 30 days after the minor's employment there.

---

[26] See § 570.116

§ 570.116 Separate applicability.

There are situations where section 12(c) does not apply because the minor himself is not considered employed in commerce or in the production of goods for commerce. This does not exclude the possibility of coverage under the provisions of section 12(a), however. In those cases where oppressive child labor is employed in commerce but not in or about a producing establishment, coverage exists under section 12(c) but not under the provisions of section 12(a). The employment of telegraph messengers under 16 years of age would normally involve this type of situation.[27] There may also be cases where oppressive child labor is employed in occupations closely related and directly essential to the production of goods in a separate establishment and therefore covered by section 12(c) but due to the fact that none of the goods produced in the establishment where the minors work are ever shipped or delivered for shipment in commerce either in the same form or as a part or ingredient of other goods, coverage of section 12(a) is lacking. An illustration of this type of situation would be the employment of a minor under the applicable age minimum in a plant engaged in the production of electricity which is sold and consumed exclusively within the same State and some of which is used by establishments in the production of goods for commerce.

[36 FR 25157, Dec. 29, 1971]

OPPRESSIVE CHILD LABOR

§ 570.117 General.

(a) Section 3(1) of the act defines "oppressive child labor" as follows:

> "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being, but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be

---

[27] In "Western Union Telegraph Co. v. Lenroot," 323 U.S. 490, the court held section 12(a) inapplicable to Western Union on the grounds that the company does not "produce" or "ship" goods within the meaning of that subsection.

deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(b) It will be noted that the term includes generally the employment of young workers under the age of 16 years in any occupation. In addition, the term includes employment of minors 16 and 17 years of age by an employer in any occupation which the Secretary finds and declares to be particularly hazardous for the employment of children of such ages or detrimental to their health or well-being. Authority is also given the Secretary to issue orders or regulations permitting the employment of children 14 and 15 years of age in nonmanufacturing and nonmining occupations where he determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being. The subsection further provides for the issuance of age certificates pursuant to regulations of the Secretary which will protect an employer from unwitting employment of oppressive child labor.

§ 570.118 Sixteen-year minimum.

The act sets a 16-year-age minimum for employment in manufacturing or mining occupations. Furthermore, this age minimum is applicable to employment in all other occupations unless otherwise provided by regulation or order issued by the Secretary.

§ 570.119 Fourteen-year minimum.

With respect to employment in occupations other than manufacturing and mining, the Secretary is authorized to issue regulations or orders lowering the age minimum to 14 years where he finds that such employment is confined to periods which will not interfere with the minors' schooling and to conditions which will not interfere with their health and well-being. Pursuant to this authority, the Secretary permits the employment of 14- and 15-year-old children in a limited number of occupations where the work is performed outside school hours and is confined to other specified limits. Under the provisions of Child Labor Regulation No. 3, as amended,[29] employment of minors in this age group is not permitted in the following occupations: (a) Manufacturing, mining, or processing occupations; (b) occupations requiring the performance of any duties in a workroom or workplace where goods are manufactured, mined, or otherwise processed; (c) occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines; (d) public messenger service; (e) occupations declared to be particularly hazardous or detrimental to health or well-being by the Secretary; or (f) occupations (except office or sales work) in connection with (1) transportation of persons or property by rail, highway, air, water, pipeline, or other means; (2) warehousing and storage; (3) communications and public utilities, and (4) construction (including demolition and repair). The exception permitting office and sales work performed in connection with the occupations specified in paragraph (f) of this section does not apply if such work is performed on trains or any other media of transportation or at the actual site of construction operations. Employment of 14- and 15-year-olds in all occupations other than the foregoing is permitted by the regulation, if the following conditions are observed: (i) Employment only outside school hours and between the hours of 7 a.m. and 7 p.m., except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.; (ii) employment for not more than 3 hours a day nor more than 18 hours a week when school is in session; and, (iii) employment for not more than 8 hours a day nor more than 40 hours a week when school is not in session. The employment of minors under 14 years of age is not permissible under any circumstances if the employment is covered by the child labor provisions and not specifically exempt.

[36 FR 25157, Dec. 29, 1971]

---

[29] Subpart C of this part.

§ 570.120 Eighteen-year minimum.

To protect young workers from hazardous employment, the act provides for a minimum age of 18 years in occupations found and declared by the Secretary to be particularly hazardous or detrimental to health or well-being for minors 16 and 17 years of age. Hazardous-occupations orders are the means through which occupations are declared to be particularly hazardous for minors. They are issued after public hearing and advice from committees composed of representatives of employers and employees of the industry and the public and in accordance with procedure established in Child Labor Regulations No. 5 published in Subpart D of this part. The effect of these orders is to raise the minimum age for employment to 18 years in the occupations covered. Seventeen orders, published in Subpart E of this part, have thus far been issued under the act and are now in effect. In general, they cover:

No. 1. Occupations in or about plants manufacturing explosives or articles containing explosive components.

No. 2. Occupations of motor-vehicle driver and helper.

No. 3. Coal-mine occupations.

No. 4. Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage-stock mill.

No. 5. Occupations involved in the operation of power-driven woodworking machines.

No. 6. Occupations involving exposure to radioactive substances.

No. 7. Occupations involved in the operation of power-driven hoisting apparatus.

No. 8. Occupations involved in the operation of power-driven metal forming, punching, and shearing machines.

No. 9. Occupations in connection with mining, other than coal.

No. 10. Occupations in or about slaughtering and meat packing establishments and rendering plants.

No. 11. Occupations involved in the operation of bakery machines.

No. 12. Occupations involved in the operations of paper products machines.

No. 13. Occupations involved in the manufacture of brick, tile, and kindred products.

No. 14. Occupations involved in the operation of circular saws, bandsaws, and guillotine shears.

No. 15. Occupations in wrecking, demolition, and shipbreaking operations.

No. 16. Occupations in roofing operations.

No. 17. Occupations in excavation operations.

[36 FR 25158, Dec. 29, 1971]

§ 570.121 Age certificates.

(a) To protect an employer from unwitting violation of the minimum age standards, it is provided in section 3(1)(2) of the act that "oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age." An age certificate is a statement of a minor's age issued under regulations of the Secretary (Child Labor Regulation No. 1),[31] based on the best available documentary evidence of age, and carrying the signatures of the minor and the issuing officer. Its purpose is to furnish an employer with reliable proof of the age of a minor employee in order that he may, as specifically provided by the act, protect himself against unintentional violation of the child labor provisions. Pursuant to the regulations of the Secretary, State employment or age certificates are accepted as proof of age in 45 States, the District of Columbia, and Puerto Rico, and Federal certificates of age in Idaho, Mississippi, South Carolina and Texas. If there is a possibility that the minor whom he intends to employ is below the applicable age minimum for the occupation in which he is to be employed, the employer should obtain an age certificate for him.

(b) It should be noted that the age certificate furnishes protection to the employer as provided by the act only if it shows the minor to be above the minimum age applicable thereunder to the occupation in which he is employed. Thus, a State certificate which shows a minor's age to be above the minimum required by State law for the occupation in which he is employed does not protect his employer for purposes of the Fair Labor Standards Act unless the age shown on such certificate is also above the minimum provided under that act for such occupation.

---

[31] Subpart A of this part.

EXEMPTIONS

§ 570.122 General.

Specific exemptions from the child labor requirements of the act are provided for (a) employment of children in agriculture outside of school hours for the school district where they live while so employed; (b) employment of employees engaged in the delivery of newspapers to the consumer; (c) employment of children as actors or performers in motion pictures or in theatrical, radio, or television productions; and (d) employment by a parent or a person standing in a parent's place of his own child or a child in his custody under the age of sixteen years in any occupation other than the following: (1) Manufacturing, (2) mining, (3) an occupation found by the Secretary to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being. In his interpretations of these provisions, the Secretary will be guided by the principle that such exemptions should be narrowly construed and their application limited to those employees who are plainly and unmistakably within their terms. Thus, the fact that a child's occupation involves the performance of work which is considered exempt from the child labor provisions will not relieve his employer from the requirements of section 12(c) or the producer, manufacturer, or dealer from the requirements of section 12(a) if, during the course of his employment, the child spends any part of his time doing work which is covered but not so exempt.

§ 570.123 Agriculture.

(a) Section 13(c) of the act provides an exemption from the child labor provisions for "any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed." This is the only exemption from the child labor provisions relating to agriculture or the products of agriculture. The various agricultural exemptions provided by sections 7(b)(3), 7(c), 13(a)(6), 13(a)(10) and 13(b)(5) from all or part of the minimum wage and overtime pay requirements are not applicable to the child labor provisions. This exemption, it will be noted, is limited to periods outside of school hours in contrast to the complete exemption for employment in "agriculture" under the wage and hours provisions. Under the original act, the exemption became operative whenever the applicable State law did not require the minor to attend school. The legislative history clearly indicates that in amending this provision, Congress sought to establish a clearer and simpler test for permissive employment which could be applied without the necessity of exploring State legal requirements regarding school attendance in the particular State. It recognized that the original provision fell short of achieving the objective of permitting agricultural work only so long as it did not infringe upon the opportunity of children for education. By recasting the exemption on an "outside of school hours" basis, Congress intended to provide a test which could be more effectively applied toward carrying out this purpose.

(b) The applicability of the exemption to employment in agriculture as defined in section 3(f)[32] of the act depends in general upon whether such employment conflict with school hours for the locality where the child lives. Since the phrase "school hours" is not defined in the act, it must be given the meaning that it has in ordinary speech. Moreover, it will be noted that the statute speaks of school hours "for the school district" rather than for the individual child. Thus, the provision does not depend for its application upon the individual student's requirements for attendance at school. For example, if an individual student is excused from his studies for a day or a part of a day by the superintendent or the school board, the exemption would not apply if school was in session then. "Outside of school hours" generally may be said to refer to such periods as before or after school hours, holidays, summer vacation, Sundays, or any other days on which the school for the district in which the minor lives does not assemble. Since "school hours for the school district" do not apply to minors who have graduated from high school, the entire year would be considered "outside of school hours" and, therefore, their employment in agriculture would be permitted at any time. While it is the position of the Department that a minor who leaves one district where schools are closed and who moves into and lives in another district where schools are in session may not work during the hours that schools are in session in the new district, it will not be asserted that this position prevents the employment of a minor in a district where schools are in session, if the school last attended by the minor has closed for summer vacation. As a reasonable precaution, however, no employer should employ a child under such circumstances before May 15, and after that date he should do so only if he is shown by the minor satisfactory evidence in the form of a written statement signed by a school official stating that the school with which he is connected is the one last attended by the minor and that the school is closed for summer vacation. Such statement should contain the minor's name, the name and address of the school, the date the school closed for the current year, the date the statement was signed, and the title of the school official signing the statement.

---

[32] "Agriculture" as defined in section 3(f) includes "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry, or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

(c) Attention is directed to the fact that by virtue of the parental exemption provided in section 3(1) of the act, children under 16 years of age are permitted to work, for their parents on their parents' farms at any time provided they are not employed in a manufacturing or mining occupation.

(d) The orders (Subpart E of this part) declaring certain occupations to be particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being do not apply to employment in agriculture, pending study as to the hazardous or detrimental nature of occupations in agriculture.[33]

[16 FR 7008, July 20, 1951, as amended at 23 FR 3062, May 8, 1958. Redesignated at 28 FR 1634, Feb. 21, 1963. Further redesignated and amended at 36 FR 25156, Dec. 29, 1971]

§ 570.124 Delivery of newspapers.

Section 13(d) of the act provides an exemption from the child labor as well as the wage and hours provisions for employees engaged in the delivery of newspapers to the consumer. This provision applies to carriers engaged in making deliveries to the homes of subscribers or other consumers of newspapers (including shopping news). It also includes employees engaged in the street sale or delivery of newspapers to the consumer. However, employees engaged in hauling newspapers to drop stations, distributing centers, newsstands, etc., do not come within the exemption because they do not deliver to the consumer.

§ 570.125 Actors and performers.

Section 13(c) of the act provides an exemption from the child labor provisions for "any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions." The term "performer" used in this provision is obviously more inclusive than the term "actor." In regulations issued pursuant to section 7(d)(3) of the act, the Administrator of the Wage and Hour Division has defined a "performer" on radio and television programs for purposes of that section.[34] The

---

[33] See note to Subpart E of this part.

[34] Section 550.2(b) of this title provides:

Continued

Secretary will follow this definition in determining whether a child is employed as a "* * * performer * * * in radio or television productions" for purposes of this exemption. Moreover, in many situations the definition will be helpful in determining whether a child qualifies as a "* * * performer in motion pictures or theatrical productions * * *" within the meaning of the exemption.

§ 570.126 Parental exemption.

By the parenthetical phrase included in section 3(l)(1) of the act, a parent or a person standing in place of a parent may employ his own child or a child in his custody under the age of 16 years in any occupation other than the following: (a) Manufacturing; (b) mining; (c) an occupation found by the Secretary to be particularly hazardous or detrimental to health or well-being for children between the ages of 16 and 18 years. This exemption may apply only in those cases where the child is exclusively employed by his parent or a person standing in his parents' place. Thus, where a child assists his father in performing work for the latter's employer and the child is considered to be employed both by his father and his father's employer, the parental exemption would not be applicable. The words "parent" or a "person standing in place of a parent" include natural parents, or any other person, where the relationship between that person and a child is such that the person may be said to stand in place of a parent. For example, one who takes a child into his home and treats it as a member of his own family, educating and supporting the child as if it were his own, is generally said to stand to the child in place of a parent. It should further be noted that occupations found by the Secretary to be hazardous or detrimental to health or well-being for children between 16 and 18 years of age, as well as manufacturing and mining occupations, are specifically excluded from the scope of the exemption.

ENFORCEMENT

§ 570.127 General.

Section 15(a)(4) of the act makes any violation of the provisions of sections 12(a) or 12(c) unlawful. Any such unlawful act or practice may be enjoined by the United States District Courts under section 17 upon court action, filed by the Secretary pursuant to section 12(b) and, if willful will subject the offender to the criminal penalties provided in section 16(a) of the act.[35]

§ 570.128 Good faith defense.

A provision is contained in section 12(a) of the Act relieving any purchaser from liability thereunder who ships or delivers for shipment in commerce goods which he acquired in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with section 12, and which he acquired for value without notice of any violation.[36]

(b) The term "performer" shall mean a person who performs a distinctive, personalized service as a part of an actual broadcast or telecast including an actor, singer, dancer, musician, comedian, or any person who entertains, affords amusement to, or occupies the interest of a radio or television audience by acting, singing, dancing, reading, narrating, performing feats of skill, or announcing, or describing or relating facts, events and other matters of interest, and who actively participates in such capacity in the actual presentation of a radio or television program. It shall not include such persons as script writers, stand-ins, or directors who are neither seen nor heard by the radio or television audience; nor shall it include persons who participate in the broadcast or telecast purely as technicians such as engineers, electricians and stage hands.

[35] Section 16(a) provides:

Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

[36] For a complete discussion of this subject see Part 789 of this title, General Statement on the Provisions of section 12(a) and section 15(a)(1) of the Fair Labor Standards Act, as amended, relating to Written Assurances.

§ 570.129 Relation to other laws.

Section 18 provides, in part, that "no provision of this act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this act." The child labor requirements of the Fair Labor Standards Act, as amended, must be complied with as to the employment of minors within their general coverage and not excepted from their operation by special provision of the act itself regardless of any State, local, or other Federal law that may be applicable to the same employment. Furthermore, any administrative action pursuant to other laws, such as the issuance of a work permit to a minor or the referral by an employment agency of a minor to an employer does not necessarily relieve a person of liability under this act. Where such other legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, however, nothing in the act, the regulations or the interpretations announced by the Secretary should be taken to override or nullify the provisions of these laws. Although compliance with other applicable legislation does not constitute compliance with the act unless the requirements of the act are thereby met, compliance with the act, on the other hand, does not relieve any person of liability under other laws that establish higher child labor standards than those prescribed by or pursuant to the act. Moreover, such laws, if at all applicable, continue to apply to the employment of all minors who either are not within the general coverage of the child labor provisions of the act or who are specifically excepted from their requirements.

PART 575—WAIVER OF CHILD LABOR PROVISIONS FOR AGRICULTURAL EMPLOYMENT OF 10 AND 11 YEAR OLD MINORS IN HAND HARVESTING OF SHORT SEASON CROPS

Sec.

575.1 Purpose and scope.
575.2 Definitions.
575.3 Application for waiver.
575.4 Information to be included in application.
575.5 Supporting data to accompany application.
575.6 Procedure for action on an application.
575.7 Statutory conditions for employment under the waiver.
575.8 Secretary's conditions for employment under the waiver.
575.9 Failure to comply with terms and conditions of the waiver.

AUTHORITY: Secs. 11, 12, 13, 18, 52 Stat. 1067, 1069, as amended; 29 U.S.C. 211, 212, 213, 218; Secretary of Labor's Order No. 16-75, 40 FR 55913; Employment Standards Order No. 2-75, 40 FR 56743.

SOURCE: 43 FR 26562, June 21, 1978, unless otherwise noted.

§ 575.1 Purpose and scope.

(a) Section 13(c)(4) was added to the Fair Labor Standards Act of 1938, as amended, by the Fair Labor Standards Amendments of 1977. This section provides that:

(A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 12 to the employment for not more than 8 weeks in any calendar year of individuals who are less than 12 years of age, but not less than 10 years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that—

(i) The crop to be harvested is one with a particularly short harvesting season and the application of section 12 would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) The employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) The level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) Individuals age 12 and above are not available for such employment; and

(v) The industry of such employer or group of employers has traditionally and substantially employed individuals under 12 years of age without displacing substantial job opportunities for individuals over 16 years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that—

(i) The individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) Such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) Such individuals be employed under such waiver (I) for not more than 8 weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(b) The child labor provisions of the Fair Labor Standards Act, section 12, require the following age standards for employment in agriculture:

(1) 16 years of age in any occupation at any time;

(2) 14 and 15 years of age outside of school hours except in occupations found and declared by the Secretary to be particularly hazardous for the employment of minors under 16 years of age (subpart E-1, 29 CFR 570.70, et seq.);

(3) 12 and 13 years of age in nonhazardous occupations outside of school hours if:

(i) Such employment is with the written consent of a parent or person standing in the place of a parent of such minor, or

(ii) Such employment is on the same farm where such parent or person is also employed;

(4) Under 12 years of age in nonhazardous occupations outside of school hours if such employment is with the written consent of a parent or person standing in place of a parent of such minor, on a farm where, because of the provisions of section 13(a)(6)(A) of the Act, none of the employees are required to be paid at the wage rate prescribed by section 6(a)(5) of the Act;

(5) 10 and 11 years of age in nonhazardous occupations outside of school hours employed to hand-harvest short season crop or crops under a waiver issued pursuant to section 13(c)(4) of the Act and this part:

(6) Minors of any age may be employed by their parents or persons standing in place of their parents at any time in any occupation on a farm owned or operated by their parents or persons standing in place of their parents.

(c) This part provides the procedures to be used under section 13(c)(4) of the Act. This part describes the information and defines the supporting data that the employer or group of employers must submit when applying for a waiver of the child labor provisions for the employment of 10 and 11 year old minors as hand-harvest laborers in an agricultural operation. It further explains the specific requirements imposed by the statute for employment under a waiver and specifies the conditions prescribed by the Secretary for employment under a waiver.

§ 575.2 Definitions.

As used in this part—

"Act" means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, et seq.).

"Administrator" means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes an authorized representative designated by the Administrator to perform any of the functions of the Administrator under this part.

"Agriculture" means agriculture as defined in section 3(f) of the Act and as interpreted in part 780 of this chapter.

"Commute daily" means the minors shall travel by foot, car, or other vehicle designed for transporting passengers from their permanent residences to the field or farm where they will work and return thereto at the end of each workday.

"Department" means the U.S. Department of Labor.

"Employer" means employer as defined in section 3(d) of the Act.

"Group of employers" means a number of employers who seek to be considered together for the purpose of applying for a waiver under section 13(c)(4) of the Act.

"Hand-harvest laborers" means agricultural workers engaged solely in harvesting by hand soil grown crops such as but not limited to berries, potatoes, and beans, and as interpreted in § 780.312 of this chapter.

"Outside school hours" means such periods as determined by the school district of the minor's permanent residence. These periods include before or after school hours, holidays, summer vacation, Saturdays, Sundays, or any other days on which the school for the school district does not assemble.

"Permanent residence" means the place where the minor and the minor's parent or person standing in place of a parent reside year-round.

"Secretary" means the Secretary of Labor, United States Department of Labor, or an authorized representative of the Secretary.

"Waiver" means a letter signed by the Administrator advising the named employer or group of employers that 10 and 11 year old minors may be employed in the hand-harvesting of the specified short season crop or crops for the period designated, in accordance with the terms and conditions set forth in section 13(c)(4) of the Act and this part.

[43 FR 26562, June 21, 1978; 43 FR 28471, June 30, 1978]

§ 575.3 Application for waiver.

(a) An application for a waiver shall be filed with the Administrator of the Wage and Hour Division, Employment Standards Administration, United States Department of Labor, Washington, D.C. 20210. To permit adequate time for processing, it is recommended that such applications be filed 6 weeks prior to the period the waiver is to be in effect.

(b) No particular form is prescribed. The application, which may be in letter form, shall be typewritten or clearly written and shall include the following information:

(1) The general information as described in section 575.4 of this part:

(i) Name and address of employer or group of employers;

(ii) Telephone number;

(iii) Location of farm(s);

(iv) Crop or crops to be hand harvested;

(v) Whether payment is customarily paid on a piece rate basis;

(vi) Requested period of waiver;

(vii) Statement that such employment shall be outside school hours;

(2) The objective data as required in section 575.5 of this part to show that:

(i) The crops have a short harvesting season;

(ii) Without 10 and 11 year olds the industry would suffer severe economic disruption;

(iii) Employment will not be deleterious to the health and well-being of 10 and 11 year olds;

(iv) The level of pesticides will not adversely affect 10 and 11 year olds;

(v) Individuals 12 years and over are not available for employment;

(vi) Employer or group of employers has traditionally used minors under 12 years and this will not displace employees 16 years or older.

(c) The application shall be signed and dated by the employer or group of employers requesting the waiver or by the authorized representative of such employer or group.

OMB CONTROL NO.: 1215-0120. (47 FR 145, Jan. 5, 1982)

[43 FR 26562, June 21, 1978, as amended at 47 FR 145, Jan. 5, 1982]

§ 575.4 Information to be included in application.

An application for a waiver pursuant to Section 13(c)(4) of the Act shall contain the following information:

(a) The name, address, and zip code of the employer, or each employer of a group of employers, and the authorized representative, if any, of an employer or group.

(b) The telephone number and area code for any employer or authorized representative from whom additional information concerning the application may be obtained.

(c) The address, location, and/or area (State, county, and/or other geographic designation), clearly identifying each employer's farm(s) or field(s) where 10 and 11 year old hand-harvest laborers are to be employed.

(d) The specific crop or crops to be hand-harvested at each designated farm or field.

(e) Substantiation of the claim that such agricultural operation "is customarily and generally recognized as being paid on a piece rate basis in the region in which such individuals would be employed." The Administrator will accept signed statements to that effect from agricultural employers and employees and others, such as agricultural extension agents, in the region of employment who are familiar with farming operations and practices in the region and with the method of compensation used in such operations and practices.

(f) Designated dates of not more than 8 weeks an any calendar year, between June 1 and October 15, during which it is anticipated that 10 and 11 year old minors will be employed in the hand-harvesting of the specified short season crop or crops.

(g) A statement that the 10- and 11-year old hand harvesters will be employed outside school hours.

§ 575.5 Supporting data to accompany application.

Objective data, as required by Section 13(c)(4) of the Act, shall also be submitted by the employer or group of employers applying for a waiver, to show that:

(a) The crop to be harvested is one with a "particularly short harvesting season." The variety of each crop to be harvested must ordinarily be harvested within 4 weeks in the region in which the waiver will be applicable. The Administrator will accept the written statement to that effect from the agricultural extension agent for the county.

(b) The 12-year minimum age prescribed by the Act for such employment would cause "severe economic disruption in the industry of the employer or group of employers applying for the waiver." Severe economic disruption in the industry refers to the consequences of not meeting a compelling need for the employment of 10- and 11-year olds to avoid loss of a significant portion of the crop. Evidence of this need includes the projected number of laborers needed to harvest the acreage planted and evidence that recruitment requirements specified in paragraph (e) of this section have been complied with. Data concerning the number of hand harvest laborers used in previous years for given acreages will serve as a basis for evaluating needs for the current year. If the requisite number of workers cannot be recruited from the labor supply of 12 years and above, this would ordinarily demonstrate the compelling need for the employment of 10 and 11 year olds.

(c) The employment of minors under the waiver "would not be deleterious to their health or well-being." This refers to the prospective effect on the health or well-being generally (i.e., other than the tolerance level of pesticides or other chemicals) of 10 and 11 year-old hand harvesters. The Administrator will accept signed statements to that effect from doctors, or nurses or public health officials in the region.

(d) The "level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of" minors employed under the waiver. The safe reentry standards established by the Environmental Protection Agency, and followed by other Federal and State agencies, were established for adult workers and have not been shown to be safe for 10 and 11 year olds. Therefore, the applicant, in order to satisfy this condition, will either have to submit a statement that no pesticides or other chemicals were used on the crop to be harvested or submit data which upon study by the Secretary or the Secretary's designee establishes a safe reentry times for 10 and 11 year olds. If such data, or additional studies conducted by the Secretary or the Secretary's designee, establish safe reentry standards for 10 and 11 year olds, this section will be amended to include such standards and the applicant will then need only identify the type and level of pesticides or chemicals used and the date of last application of same prior to harvest.

(e) Individuals age 12 and above are not available for such employment.

Evidence of such unavailability must be documented by the applicant by:

(1) Placement of intrastate and interstate job orders, in which the piece rate is specified, with the state employment service sufficiently in advance of the harvest to allow reasonable time for the recruitment of local and migrant workers. An interstate order need not be placed if the applicant can demonstrate that suitable housing is not available.

(2) Placement of at least two advertisements in local papers of general circulation or advertisements over local radio stations.

(3) Contact with farm labor contractors, migrant workers, and other potential workers.

(4) Contact with schools, business and labor organizations, non-profit organizations and public agencies to enlist their help. Data showing the responses received to these solicitations must be categorized by age and submitted with the waiver application to verify that older workers are not available to perform the work.

(f) The "industry of such employer or groups of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age." Documentation that the industry has traditionally and substantially employed individuals under 12 years of age may include newspaper reports, magazine articles, research organization reports, or other appropriate sources. Data to indicate that such employment did not displace substantial job opportunities for individuals over 16 years of age may include the signed statement of an appropriate official of the employment service agency of the State (or States, if region designated crosses State lines) certifying to that fact. This certification must be based on statistical documentation for at least the previous year.

(g) When supporting data required by this section are submitted by an employer or group of employers, the objective data required by paragraph (d) of this section shall be submitted on the basis of each individual employer. However, objective data required by paragraphs (a), (b), (c), (e), and (f) of this section may be submitted for the specific geographic area, e.g., an entire county, of the employer or group of employers.

[43 FR 26562, June 21, 1978; 43 FR 28471, June 30, 1978, as amended at 44 FR 22061, Apr. 13, 1979; 44 FR 24059, Apr. 24, 1979; 44 FR 29049, May 18, 1979; 45 FR 55177, Aug. 19, 1980]

§ 575.6 Procedure for action on an application.

(a) Upon receipt of an application for a waiver, the Administrator shall review all of the information and supporting data. If sufficient, the Administrator shall grant a waiver; if insufficient, the Administrator may seek further information. If such information is not made available to the Administrator, the Administrator shall deny the waiver.

(b) The Administrator shall deny the application for a waiver from any employer against whom a final civil money penalty is outstanding under section 16(e) of the Act for violation of the child labor provisions of the Act.

(c) The waiver, in the form of a letter signed by the Administrator, shall set forth the terms and conditions for employment under the waiver as provided in §§ 575.7 and 575.8. The waiver shall be issued to the employer or group of employers applying for it.

(d) If a waiver is granted there will be published in the FEDERAL REGISTER a general notice to that effect setting forth for each waiver granted: the name of the employer or the name of each employer of a group of employers; the address of each such employer, including city, state, and zip code; and the dates of the period the waiver will be in effect.

(e) If a waiver is denied, the Administrator shall give written notice of such denial to the employer or group of employers applying for a waiver. Such denial will be without prejudice to the filing of any subsequent application.

§ 575.7 Statutory conditions for employment under the waiver.

Any waiver granted pursuant to Section 13(c)(4) of the Act and this part shall require that:

(a) Employment of 10 and 11 year old minors pursuant to the waiver be outside school hours.

(b) Individuals employed commute daily from their permanent residence to the farms(s) or field(s) where employed.

(c) Such individuals be employed for not more than 8 weeks between June 1 and October 15 of any calendar year. When schools are in session, any employment under a waiver shall be confined to outside of school hours.

§ 575.8 Secretary's conditions for employment under the waiver.

The Secretary prescribes the following terms and conditions for the protection of minors employed pursuant to a waiver granted under Section 13(c)(4) of the Act:

(a) An employer or group of employers granted such a waiver shall obtain and keep on file a signed statement of the parent or person standing in the place of the parent of each 10 and 11-year old minor employed consenting to the employment of such minor under the waiver.

(b) Any employment pursuant to a waiver shall be in compliance with applicable Federal and State laws, and any regulations issued under them.

(c) No employer or group of employers shall employ any 10 or 11 year old minor pursuant to a waiver for more than 5 hours in any one day or for more than 30 hours in any workweek with a meal break of at least 30 minutes and two rest breaks of at least 15 minutes each.

(d) An employer or group of employers granted such a waiver shall provide immediately adjacent to the field(s) to be hand harvested: (1) Adequate sanitary facilities, such as portable toilets; (2) adequate and clean drinking water in covered containers with spouts, and an adequate supply of paper or plastic cups for individual drinking use; and (3) a specified adult employee, who is appropriately equipped and is knowledgeable about first-aid treatment and readily available to give such treatment when needed.

(e) An employer or group of employers granted such a waiver shall provide emergency transportation either to the minor's permanent residence or to the nearest hospital for any 10 or 11 year old hand harvester who becomes ill or is injured during the normal hours of employment.

(f) No 10 or 11 year old employed under a waiver shall ride upon or be employed in the operation of or in the close proximity to any power driven machinery or equipment. Generally, a distance of fifty feet or more will be construed to meet the requirement that employment not be in "close proximity" to machinery or equipment.

(g) An employer or group of employers granted such a waiver who owns, operates, or causes to be operated any vehicle for the transportation of such minors shall be responsible for assuring that:

(1) Every such vehicle is in compliance with all applicable Federal and State safety and health standards and with the rules and regulations issued by the Bureau of Motor Carrier Safety, Federal Highway Administration of the U.S. Department of Transportation;

(2) Every such vehicle be designed for transporting passengers and be operated by a lawfully licensed driver; and

(3) A vehicle liability insurance policy provides insurance in an amount not less than the amounts applicable to vehicles used in the transportation of passengers under the Interstate Commerce Act and its regulations. These amounts currently are as follows:

INSURANCE REQUIRED FOR PASSENGER EQUIPMENT

	12 or less passengers	More than 12 passengers
Limit for bodily injuries to or death of 1 person	$100,000	$100,000
Limit for bodily injuries to or death of all persons injured or killed in any 1 accident (subject to a maximum of $100,000 for bodily injuries to or death of 1 person)	300,000	500,000
Limit for loss or damage in any 1 accident to property of others (excluding cargo)	50,000	50,000

(h) A copy of the waiver shall be posted or readily available at the site or sites of such employment of such minors during the entire period.

(i) The employer or group of employers shall maintain and preserve a record of the name, address, and occupation of each minor employed under the waiver in accordance with § 516.33(b) of this chapter. In addition, the record shall also include the date of birth, the name and address of the school in which the minor is enrolled, and the number of hours worked each day and each week of the designated period. Each employer required to maintain records under this part shall preserve them for a period of at least 2 years.

(j) A waiver shall be effective for the period designated therein with no provision for amendment

[43 FR 26562, June 21, 1978; 43 FR 28471, June 30, 1978]

§ 575.9 Failure to comply with the terms and conditions of the waiver.

If the employer or group of employers granted a waiver pursuant to section 13(c)(4) of the Act and this part do not comply with the terms and conditions set forth in the waiver and this part, the waiver shall be null and void and the employer or group of employers will be subject to civil money penalties under section 16(e) of the Act.

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

Sec.
579.1 Purpose and scope.
579.2 Definitions.
579.3 Violations for which penalty may be imposed.
579.4 Civil money penalties—notice; finality.
579.5 Assessing the penalty.
579.6 Exception to notice of penalty.
579.7 Administrative proceedings.
579.8 Collection and recovery of penalty.

AUTHORITY: Secs. 3, 11, 12, 16, 52 Stat. 1060, as amended, 1066, as amended, 1067 as amended, 1069 as amended; 29 U.S.C. 203, 211, 212, 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App.; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 1371, 36 FR 8755; Employment Standards Order No. 174, 39 FR 33841.

SOURCE: 40 FR 25792, June 18, 1975, unless otherwise noted.

§ 579.1 Purpose and scope.

(a) Section 16(e), added to the Fair Labor Standards Act of 1938, as amended, by the Fair Labor Standards Amendments of 1974, provides that:

> Any person who violates the provisions of section 12, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be—
>
> (1) deducted from any sums owing by the United States to the person charged;
>
> (2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or
>
> (3) ordered by the court, in an action brought for a violation of section 15(a)(4), to be paid to the Secretary.
>
> Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, U.S.C., and regulations to be pro-

BEST DOCUMENT AVAILABLE

mulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes" [29 U.S.C. 9a] .

(b) This part provides for the issuance of the notice of civil penalty for any violation of section 12 of the Act relating to child labor or any regulation issued under that section; describes the violations for which a penalty may be imposed and the factors to be considered by the Secretary of Labor or the Secretary's designated representative in assessing the amount of such a penalty; outlines the procedure for an exception to the determination that the violations occurred which may be filed by the person so charged; and summarizes the methods provided for collection and recovery of the penalty.

§ 579.2 Definitions.

As used in this part and Part 580 of this chapter—

"Act" means the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, et seq.);

"Administrative law judge" means a person appointed as provided in 5 U.S.C. 3105 and Subpart B of Part 930 of Title 5 of the CFR, and qualified to preside at hearings under 5 U.S.C. 554-557.

"Administrator" means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes an authorized representative designated by the Administrator to perform any of the functions of the Administrator under this part and Part 580 of this chapter.

"Agency" has the meaning given it by 5 U.S.C. 551.

"Chief Administrative Law Judge" means the Chief Administrative Law Judge, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210.

"Department" means the U.S. Department of Labor.

"Person" includes any individual, partnership, corporation, association, business trust, legal representative, or organized group of persons.

"Secretary" means the Secretary of Labor, U.S. Department of Labor, or an authorized representative of the Secretary.

"Solicitor of Labor" means the Solicitor, U.S. Department of Labor, and includes attorneys designated by the Solicitor to perform functions of the Solicitor under this part and Part 780 of this chapter.

[40 FR 25792, June 18, 1975, as amended at 40 FR 53237, Nov. 17, 1975]

§ 579.3 Violations for which penalty may be imposed.

(a) *What constitutes the violation.* Each of the following constitutes a violation of the Act and/or the Secretary's regulations for which a penalty as provided by section 16(e) of the Act and this part may be imposed, unless employment of the minor or minors referred to is shown to come within a specific exemption or exception described in paragraph (c) of this section:

(1) Each shipment or delivery for shipment in commerce by a producer, manufacturer, or dealer of any goods produced in an establishment situated in the United States in or about which, within thirty days prior to the removal of such goods therefrom, there has been employed any minor as described in paragraph (b) of this section;

(2) Each employment by an employer of any minor as described in paragraph (b) of this section, for any period in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce;

(3)-(4) [Reserved]

(5) The failure by an employer employing any minor for whom records must be kept under any provision of 29 CFR Part 516 or of 29 CFR Part 545 to maintain and preserve, as required by such provision, such records concerning the date of the minor's birth and concerning the proof of the minor's age as are specified therein; and

(6) The failure by an employer employing any minor subject to any provision of 29 CFR Part 570, to take or cause to be taken such action as is necessary to assure compliance with all requirements of such provision which, by the regulations in such part, are made conditions for lawful employment of such minor.

(b) *Minors whose employment may result in violation.* The violations described in paragraph (a) may result from employment of any of the following minors as described:

(1) Any minor under the age of 18 years in any occupation (other than in agriculture) in which employment, as set forth in Subpart E of Part 570 of this chapter, has been found and declared by the Secretary to be particularly hazardous for or detrimental to the health or well-being of minors below such age;

(2) Any minor under the age of 16 years—

(i) In agriculture during school hours for the school district where such minor is living while so employed; or

(ii) In agriculture in any occupation found and declared by the Secretary as set forth in Subpart E-1 of Part 570 of this chapter, to be particularly hazardous for the employment of minors below such age; or

(iii) In any manufacturing or mining occupation; or

(iv) In any other occupation other than in agriculture unless it is established that such minor is at least 14 years of age and the employment of such minor in such occupation is specifically permitted by and in accord with regulations of the Secretary as set forth in Subpart C of Part 570 of this chapter;

(3) Any minor under the age of 14 years—

(i) In any occupation other than in agriculture; or

(ii) In agriculture, outside of school hours for the school district where such minor is living while so employed, unless it is established either—

(A) That such minor is not less than 12 years of age *and* either (*1*) that such employment is with the written consent of a parent or person standing in place of a parent of such minor, or (*2*) that such employment is on the same farm where such parent or person is also employed; or

(B) That such minor, if less than 12 years of age, is employed as described in paragraph (b)(4)(i) or (b)(4)(ii) of this section; and

(4) Any minor under the age of 12 years, unless it is established that such minor is employed in agriculture outside of school hours for the school district where such minor is living while so employed, and—

(i) Is employed by a parent or by a person standing in place of a parent of such minor, on a farm owned or operated by such parent or person; or

(ii) Is employed with the written consent of a parent or person standing in place of a parent of such minor, on a farm where, because of the provisions of section 13(a)(6) of the Act, none of the employees are required to be paid at the wage rate prescribed by section 6(a)(5) of the Act.

(c) *Exemptions and exceptions.* Conduct which otherwise might constitute a violation of the Act as described in paragraphs (a) and (b) of this section may be shown to be not violative of the child labor provisions by evidence that a specific exemption or exception provided in the Act makes such conduct permissible. Thus, the Act provides:

(1) That none of the child labor provisions of section 12 shall apply to (i) any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions; (ii) any employee engaged in the delivery of newspapers to the consumer; (iii) any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths); or (iv) any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the States, territories, and possessions listed in section 13(f) of the Act (see Act, sections 13(c)(3), 13(d), 13(f));

(2) That, with respect to the violations described in paragraph (a)(1) of

this section, any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of section 12 of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited (see Act, section 12(a) and 29 CFR Part 789);

(3) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors as described in paragraph (b)(2)(iv), a parent or person standing in place of a parent may lawfully employ his or her own child or a child in his or her custody under the age of 16 years in an occupation *other than* (i) manufacturing or (ii) mining or (iii) an occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being, and an employer may lawfully employ a young worker between 14 and 16 years of age in an occupation permitted and under conditions prescribed by 29 CFR Part 570, Subpart C;

(4) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors in agriculture as described in paragraph (b)(2)(iii), a parent or person standing in place of a parent may lawfully employ on a farm owned or operated by such parent or person, his or her own child or a child in his or her custody under the age of 16 years in an occupation in agriculture found and declared by the Secretary of Labor to be particularly hazardous for the employment of children below such age;

(5) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors in agriculture as described in paragraph (b)(3)(ii), employment of minors 12 or 13 years of age is lawful under the conditions prescribed in paragraph (b)(3)(ii)(A) of this section and employment of minors under 12 years of age is lawful under the conditions prescribed in paragraph (b)(3)(ii)(B) of this section; and

(6) That, with respect to violations described in paragraph (a)(2) of this section resulting from employment of minors in agriculture as described in paragraph (b)(4), employment of minors under 12 years of age is lawful under the conditions prescribed in paragraph (b)(4) (i) or (ii) of this section.

[40 FR 25792, June 18, 1975, as amended at 41 FR 26836, June 29, 1976]

§ 579.4 Civil money penalties—notice; finality.

(a) In any instance when the Secretary finds, upon evidence resulting from an investigation pursuant to the provisions of section 11 of the Act, that there has been a violation by any person of section 12 of the Act relating to child labor or of any regulation issued under that section, and that imposition of a civil money penalty for such violation pursuant to section 16(e) of the Act is appropriate, the Secretary shall assess such penalty in accordance with the provisions of § 579.5 and shall issue and transmit to such person by certified mail a notice of penalty describing each such violation and stating the amount of the penalty assessed therefor. Information shall be included with the notice of penalty concerning the right of the person so charged to file an exception thereto and the procedure to be followed.

(b) If the person charged with violation does not, within 15 days after receipt of the notice, take exception to the determination that the violation or violations for which the penalty is imposed occurred, the administrative determination by the Secretary of the amount of such penalty shall be deemed final, and collection and recovery of the penalty shall be instituted pursuant to § 579.8 of this part.

(c) If the person charged with the violation files, within 15 days after receipt of the notice, an exception to the determination that the violation or violations for which the penalty is imposed occurred, the final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, U.S.C., and regulations of the Secretary in Part 580 of this chapter.

§ 579.5 Assessing the penalty.

(a) The administrative determination of the amount of the civil penalty, of not to exceed $1,000 for each violation of section 12 of the Act relating to child labor or of any regulation issued under that section shall be based on the available evidence of the violation or violations and shall take into consideration the size of the business of the person charged and the gravity of the violation as provided in paragraphs (b) through (d) of this section.

(b) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the size of the business of the person charged with the violation or violations, taking into account the number of employees employed by that person (and if the employment is in agriculture, the man-days of hired farm labor used in pertinent calendar quarters), dollar volume of sales or business done, amount of capital investment and financial resources, and such other information as may be available relative to the size of the business of such person.

(c) In determining the amount of such penalty there shall be considered the appropriateness of such penalty to the gravity of the violation or violations, taking into account, among other things, any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours.

(d) Based on all the evidence available, including the investigation history of the person so charged and the degree of willfulness involved in the violation, it shall further be determined, where appropriate,

(1) Whether the evidence shows that the violation is "de minimis" and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act; or

(2) Whether the evidence shows that the person so charged had no previous history of child labor violations, that the violations themselves involved no intentional or heedless exposure of any minor to any obvious hazard or detriment to health or well-being and were inadvertent, and that the person so charged has given credible assurance of future compliance, and whether a civil penalty in the circumstances is necessary to achieve the objectives of the Act.

(e) An administrative determination of the amount of the civil money penalty for a particular violation or particular violations of section 12 relating to child labor or any regulation issued under that section shall become final 15 days after receipt of the notice of penalty by certified mail by the person so charged unless such person has, pursuant to § 579.6 filed with the Secretary an exception to the determination that the violation or violations for which the penalty is imposed occurred.

(f) A determination of the penalty made in an administrative proceeding after opportunity for hearing as provided in section 16(e) of the Act and pursuant to Part 580 of this chapter shall be final.

§ 579.6 Exception to notice of penalty.

(a) An exception to the determination that the child labor violation or violations, for which the penalty is imposed, occurred may be filed within 15 days after receipt of the notice of penalty by the person so charged.

(b) An exception to such determination shall be filed with the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210.

(c) No particular form is prescribed for the exception to the notice of penalty. However, the exception shall be typewritten or clearly written shall be directed to the issue of the occurrence of the alleged violations, and shall state the reasons why the person charged contends that the determination regarding their occurrence is in error. The exception shall be signed by the person so charged or by such person's attorney or other authorized representative.

(d) In computing the 15 days allowed for filing exception to the determination that the violation or violations occurred, Saturdays, Sundays, and holidays shall be included, but when such time expires on such a day, such period shall be extended to include the next following day which is not such a day.

§ 579.7 Administrative proceedings.

Upon receipt of an exception to a notice of penalty under this part the Administrator shall refer the matter to the Chief Administrative Law Judge who shall assign the matter to an administrative law judge for hearing and final determination of the penalty. The rules of practice for such administrative proceedings are set forth in Part 580 of this chapter.

§ 579.8 Collection and recovery of penalty.

(a) When the determination of the amount of any civil money penalty provided for in this part becomes final under § 579.4(b) in accordance with the administrative assessment thereof, or under § 579.4(c) pursuant to the decision and order of an administrative law judge in an administrative proceeding as provided in Part 580 of this chapter, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor. The person against whom such penalty has been assessed or imposed shall promptly remit the amount thereof, as finally determined, to the Secretary by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor." Such remittance may be delivered or mailed to the Regional Office, Wage and Hour Division, for the area in which the violations for which the penalty was assessed occurred, where the penalty has become final under § 579.4(b). Where the penalty has been finally determined as provided in § 579.4 (c) in an administrative proceeding, the remittance should be made through the counsel representing the Secretary before the administrative law judge. If the person from whom the penalty is due fails to remit the amount thereof within 30 days after such amount is finally determined, proceedings for collection or recovery thereof may be instituted as provided in paragraph (b) of this section.

(b) Pursuant to the provisions of the Act set forth in § 579.1, the amount of penalty, finally determined as provided in § 579.4 (b) or (c), may be:

(1) Deducted from any sums owing by the United States to the person charged. To effect this, any agency having sums owing from the United States to such person shall, on the request of the Secretary, withhold the specific amount of the penalty from the sums owed to the person so charged and remit that amount to the Secretary to satisfy the amount of the penalty assessed;

(2) Recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor. When the person against whom a final determination assessing a civil money penalty has been made does not voluntarily remit the amount of such penalty to the Secretary within a reasonable time after notification to do so, the Solicitor of Labor may institute such an action to recover the amount of the penalty; or

(3) Ordered by the court, in an action brought for a violation of section 15(a) (4), to be paid to the Secretary. Section 15(a) (4) of the Act makes any violation of the provisions of section 12 unlawful. Any such unlawful act or practice may be enjoined by the United States district courts under section 17 upon court action, filed by the Secretary pursuant to section 12(b); and failure of the person so enjoined to comply with the court order may subject such person to contempt proceedings. A willful violation of section 12 of the Act may subject the offender to the penalties provided

in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. In any of the foregoing civil or criminal proceedings, the court may order the payment to the Secretary of the civil penalty finally assessed by the Secretary.

(c) As provided in section 16(e) of the Act, the sums collected as penalties pursuant to the provisions of that section and of this part shall be applied by the Secretary toward the reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of title 29 of the U.S.C.

PART 580—CIVIL PENALTIES FOR CHILD LABOR VIOLATIONS—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS

GENERAL

Sec.
580.1 Applicability of rules; definitions.

COMMENCEMENT OF PROCEEDING

580.2 Notice of penalty and exception thereto.
580.3 Action pursuant to exception.
580.4 Notice of hearing.
580.5 Supplemental pleadings.

SERVICE UPON PARTIES OF PLEADINGS AND DOCUMENTS

580.8 Manner of service.
580.9 Proof of service.
580.10 Service upon Department of Labor; number of copies.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE, GENERALLY

580.11 Authority of administrative law judge.
580.12 Appearances; representation of parties.
580.13 Motions and requests.
580.14 Subpenas.
580.15 Witnesses and fees.
580.16 Depositions.
580.17 Prehearing conferences.
580.18 Consent findings and order.
580.19 Computation of time.

HEARINGS

580.21 Hearing procedures generally.
580.22 Evidence at the hearing.
580.23 Official notice.
580.24 Transcripts.

POST-HEARING PROCEDURES

Sec.
580.31 Proposals by the parties.
580.32 Decision and order of administrative law judge.

AUTHORITY: Secs. 3, 11, 12, 16, 52 Stat. 1060, as amended, 1066, as amended, 1067, as amended, 1069, as amended; 29 U.S.C. 203, 211, 212, 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App.; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 13-71, 36 FR 8755; Employment Standards Order No. 174, 39 FR 33841; 5 U.S.C. 500, 503, 551, 559.

SOURCE: 40 FR 25792, June 18, 1975, unless otherwise noted.

GENERAL

§ 580.1 Applicability of rules; definitions.

(a) This part provides the rules of practice for administrative proceedings relating to determination of civil penalties for violation of the child labor provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 55), and of the regulations issued thereunder. See also Part 579 of this chapter for rules governing the issuance of notices of penalty for violations of section 12 of the Act and of the regulations issued under such section relating to child labor.

(b) The definitions set forth in § 579.2 of Part 579 of this chapter are applicable to the terms therein defined wherever used in this part.

COMMENCEMENT OF PROCEEDING

§ 580.2 Notice of penalty and exception thereto.

Any person charged with violation or violations of section 12 of the Act relating to child labor or any regulation issued under that section who receives a notice of such charge and of the assessment of a penalty or penalties therefor issued by the Secretary as provided in § 579.4 of this chapter may obtain a hearing thereon under the provisions of this part by filing with the Administrator, within 15 days after receipt of such notice and as provided in § 579.6 of this chapter, an exception to the determination that the violations for which the penalty is imposed occurred.

§ 580.3 Action pursuant to exception.

(a) Upon timely receipt of an exception to the determination of the violations charged in the notice of penalty, the Administrator shall promptly by order refer the matter, as provided in § 579.7 of this chapter, to the Chief Administrative Law Judge for the final determination in an administrative proceeding as provided in this part, with opportunity for hearing before an administrative law judge, on the issues with respect to the alleged violations and any penalties therefor.

(b) The Administrator, with such order of referral, shall transmit an authenticated copy of the notice of penalty excepted to, together with the exception signed and filed by the person charged with the violations. These shall be filed of record in the Office of Administrative Law Judges and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to such amendment as may be permitted under the provisions of this part.

(c) The proceeding shall be identified of record by, and any motions, pleadings, briefs, or other formal documents filed and docketed therein should carry, a number preceded by the letters "CL" and a caption identifying "Secretary of Labor" as plaintiff and the person charged with violations, by name, as respondent.

(d) After the notice of penalty and exception referred to the Chief Administrative Law Judge by the Administrator have been filed of record, the Chief Administrative Law Judge shall promptly designate an administrative law judge to conduct the proceeding in accordance with section 554 of Title 5, U.S.C. and the provisions of this part, and shall refer the matter to such judge for further action.

(e) Whenever a proceeding under this part is commenced by referral of the notice of penalty and exception thereto to the Chief Administrative Law Judge, the Administrator shall cause to be served on the person charged with the violations a copy of the order making such referral, together with a copy of the regulations in this Part 580.

§ 580.4 Notice of hearing.

The administrative law judge to whom the matter is referred shall, within 10 days following such referral, notify the parties by certified mail of a time and place set for hearing thereon or for a prehearing conference to be held as provided in § 580.17 of this part, or both. No date earlier than 14 days after the date of such notice shall be set for such hearing or such conference, except by agreement of the parties. Service of such notice shall be made upon the parties as provided in § 580.8.

§ 580.5 Supplemental pleadings.

If, upon review the notice of penalty and the exception thereto, it appears to either party that such document as originally drafted by such party requires supplementation in order to clarify the issues for a hearing thereon, an amended complaint may be filed by the Secretary or an amended answer may be filed by respondent, as the case may be. Such supplemental pleading shall be filed with the Chief Administrative Law Judge, Washington, D.C. 20210, with proof of service upon the opposing party, at least 10 days prior to the date set for hearing or for a prehearing conference by the administrative law judge before whom the matter is pending, unless the time for filing such document is extended by the judge. If an amended complaint is filed by the Secretary, the respondent shall be entitled, if he or she desires to do so, to file with the Chief Administrative Law Judge an amended answer in response within 10 days after service upon the respondent of such amended complaint.

SERVICE UPON PARTIES OF PLEADINGS AND DOCUMENTS

§ 580.8 Manner of service.

Service upon any party of a pleading or document shall be made by delivering a copy or mailing a copy to the last known address. When a party is represented by an attorney, service shall be made upon the attorney.

§ 580.9 Proof of service.

A certificate of the person serving the pleading or other document by personal delivery or by mailing, setting forth the manner of said service shall be proof of the service.

§ 580.10 Service upon Department of Labor; number of copies.

An original and three copies of all pleadings and other documents shall be filed with the Department of Labor, the original with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. 20210, and the copies with the attorney representing the Department in the proceeding or the Associate Solicitor for Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

[40 FR 25792, June 18, 1975, as amended at 47 FR 24702, June 8, 1982]

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE, GENERALLY

§ 580.11 Authority of administrative law judge.

(a) *General powers.* In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpenas upon proper applications as provided in § 580.14;

(3) To rule upon offers of proof and receive relevant evidence;

(4) To take or cause to be taken depositions and to determine their scope;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel therein;

(6) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) To consider and rule upon procedural requests;

(8) To make and file decisions in conformity with this part;

(9) To take any action authorized by the rules in this part or in conformance with the Administrative Procedure Act; and

(10) To exercise, for the purpose of the hearing and in regulating the conduct of the proceeding, such powers vested in the Secretary by section 9 of the Act as are necessary and appropriate therefor.

(b) *Consultation.* The administrative law judge shall not consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate.

(c) *Disqualification.* (1) When an administrative law judge deems himself/herself disqualified to preside in a particular proceeding, such judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Law Judge.

(2) Whenever any party shall deem the administrative law judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Chief Administrative Law Judge a motion to disqualify and remove such administrative law judge, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. The Chief Administrative Law Judge shall rule upon the motion.

(3) In the event of disqualification of an administrative law judge as provided in paragraph (c)(1) or paragraph (c) (2) of this section, the Chief Administrative Law Judge shall refer the matter to another administrative law judge for further proceedings.

§ 580.12 Appearances; representation of parties.

Counsel designated by the Solicitor of Labor shall represent the Secretary and appear for the Secretary in any proceeding under this part. Respondents shall have the right to appear by or with counsel of their choice, who shall qualify for such representation as provided in 5 U.S.C. 500(b). If not represented by counsel, respondents may appear in person or through authorized agents and may submit necessary documents with their own signatures.

§ 580.13 Motions and requests.

Motions or requests shall be in writing, filed with the Chief Administrative Law Judge, and copies served upon the other parties to the proceeding, except that motions or requests made during the course of any hearing or appearance before the administrative law judge shall be filed with such judge or shall be stated orally and made part of the transcript. Each motion or request shall state the particular order, ruling, or action desired, and the grounds therefor. The administrative law judge is authorized to rule upon all motions or requests filed or made prior to the filing of the judge's decision as provided in § 580.32.

§ 580.14 Subpenas.

All applications for subpenas *ad testificandum* and subpenas *duces tecum* shall be made in writing to the administrative law judge. Applications for subpenas *duces tecum* shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope.

§ 580.15 Witnesses and fees.

(a) The administrative law judge, either at the request of the parties or upon the judge's own motion, may request persons to appear to testify as witnesses, where such action is deemed necessary to serve the purposes of the hearing.

(b) Witnesses subpenaed by any party or by the administrative law judge shall be paid the same fees and mileage as are paid for like services in the district courts of the United States. The witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

§ 580.16 Depositions.

(a) *When, how, and by whom taken.* For good cause shown, the testimony of any witness may be taken by deposition. Depositions may be taken orally or upon written interrogatories before any person designated by the administrative law judge and having power to administer oaths.

(b) *Application.* Any party desiring to take the deposition of a witness shall make application in writing to the administrative law judge, setting forth the reasons why such deposition should be taken; the time when, the place where, and the name and post office address of, the person before whom the deposition is to be taken; the name and address of each witness from whom a deposition is to be taken; and the subject matter concerning which each such witness is expected to testify.

(c) *Notice.* Such notice as the administrative law judge shall order shall be given for the taking of a deposition, but this shall not be less than 5 days' written notice when the deposition is to be taken within the United States and not less than 20 days' written notice when the deposition is to be taken elsewhere.

(d) *Taking and receiving in evidence.* Each witness testifying upon deposition shall be sworn, and the adverse party shall have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, read to and subscribed by the witness, and certified by the officer. Thereafter, the officer shall seal the deposition, with two copies thereof, in an envelope and mail the same by certified mail to the administrative law judge. Subject to such objections to the questions and answers as were noted at the time of taking the deposition and would be valid were the witness personally persent and testifying, such deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof. No part of a deposition' shall be admitted in evidence unless there is a showing that the reasons for the taking of the deposition in the first instance exist at the time of hearing.

§ 580.17 Prehearing conferences.

(a) Upon motion of the parties or when deemed appropriate by the administrative law judge, the judge may direct the parties or their counsel to meet with the judge for a conference to consider;

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

(3) Stipulations, admissions of fact and of contents and authenticity of documents;

(4) Limitation of the number of expert witnesses; and

(5) Such other matters as may tend to expedite the disposition of the proceeding.

(b) The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceeding shall be controlled by such action.

§ 580.18 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part and prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the administrative law judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of penalty (or amended complaint, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the administrative law judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement for consideration by the administrative law judge; or

(2) Inform the administrative law judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the administrative law judge, within 30 days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing his/her decision based upon the agreed findings.

[40 FR 25792, June 18, 1975, as amended at 40 FR 27218, June 27, 1975]

§ 580.19 Computation of time.

Saturdays, Sundays, and holidays shall be included in computing the time allowed for filing any document or paper under this part, but when such time expires on such a day, such period shall be extended to include the next following day which is not such a day.

HEARINGS

§ 580.21 Hearing procedures generally.

(a) Pursuant to notice given as provided in § 580.4, the designated administrative law judge shall hold such hearings as provided in this part as are necessary for determination of the issues submitted for decision, exercising the powers set forth in § 580.11 and conducting the proceeding in accordance with the provisions of 5 U.S.C. 554. In any such hearing the burden of proving the violations alleged shall be upon the Secretary and except as may be determined otherwise by the administrative law judge, counsel for the Secretary shall proceed first at the hearing. The hearing shall be open to the public, unless otherwise ordered by the administrative law judge.

(b) If any party to the proceeding, after being properly served with notice of the hearing, should fail to appear at the hearing, the matter may be set for further hearing upon notice, but a party who is present shall first have an election to present such party's evidence in whole or such portion thereof sufficient to make a prima facie case in which event the administrative law judge may make a decision without further hearing. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the administrative law judge's decision.

(c) Contemptuous conduct at any hearing shall be ground for exclusion from the hearing.

§ 580.22 Evidence at the hearing.

(a) *In general.* The testimony of witnesses shall be upon oath or affirmation administered by the administrative law judge and shall be subject to such cross-examination as may be required for a full and true disclosure of the facts. The administrative law judge shall exclude evidence which is immaterial, irrelevant, or unduly repetitious.

(b) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, such party shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Formal exception to an adverse ruling is not required.

(c) *Failure or refusal of witness to appear or answer.* The failure or refusal of a witness to appear at any hearing or to answer any question which has been ruled to be proper shall be grounds for the action provided in sections 49 and 50 of title 15, U.S.C., pursuant to the provisions of section 9 of the Act, and, in the discretion of the administrative law judge, for striking out all or part of the testimony which may have been given by such witness.

§ 580.23 Official notice.

Official notice may be taken of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice and also concerning which the Department by reason of its functions is presumed to be expert: *Provided,* That the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision of the matters so noticed, and shall be given adequate opportunity to show the contrary.

§ 580.24 Transcripts.

Hearings shall be stenographically reported. Copies of the transcript may be obtained by the parties upon written application to the Department at fees fixed in accordance with section 11 of the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. App.) and Part 70 of this title.

POST-HEARING PROCEDURES

§ 580.31 Proposals by the parties.

At the end of the hearing, the administrative law judge shall afford any party a reasonable period of time, but not less than 15 days, to file proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Such proposals shall be accompanied by a certification that service of the proposals has been made upon all other parties, and shall refer to all portions of the record and to all authorities relied upon in support of each proposal.

§ 580.32 Decision and order of administrative law judge.

(a) The administrative law judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers provided for in § 580.31, the judge's decision in the matter, which shall become the final decision in the administrative process as provided in the Act upon service of copies thereof upon the parties. The decision of the administrative law judge shall include a statement of findings and conclusions, with reasons and bases therefor, upon each material issue of fact, law, or discretion presented on the record. The decision shall also include an appropriate order which may affirm, in whole or in part, the determination by the Administrator of the occurrence of violations or which may find that no violations occurred, and shall order payment of a penalty in the amount originally assessed or in a lesser amount determined in accordance with 29 CFR 579.5 or order that respondent pay no penalty, as appropriate. The reasons for such action shall be stated in the decision.

(b) The administrative law judge shall transmit to the Chief Administrative Law Judge the entire record including the original of the decision. The Chief Administrative Law Judge shall serve copies of the decision on each of the parties.

PART 601—NONRUBBER FOOTWEAR INDUSTRY IN PUERTO RICO

Sec.
601.1 Definition.
601.2 Wage rates.
601.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 601.1 Definition.

(a) The Nonrubber Footwear Industry in Puerto Rico is defined as the manufacture of footwear, except rubber and plastics footwear or footwear made by knitting and crocheting; and the manufacture of cut stock and findings for footwear, except that of rubber and plastics: *Provided, however*, That the industry shall not include any activity included in the rubber and plastics footwear industry or the rubber and miscellaneous plastics products industry.

(b) The industry encompasses, but is not limited to, shoes, slippers, moccasins, boots, boot tops, sandals, and athletic footwear, including footwear of leather, artificial leather and vinyl. The industry does not include footwear made by vulcanizing or molding soles to fabric uppers, plastics footwear molded to shape, or rubber and plastics protective footwear, sandals, and slippers. Also included are cut stock and findings for footwear from all materials except rubber and plastics; boot and shoe patterns; and ornaments and trimmings designed primarily for use on shoes.

[39 FR 13271, Apr. 12, 1974]

§ 601.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the shoe and related products industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, as these terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum wage for this classification is $1.45 per hour.

(2) This classification is defined as all activities of employees in the shoe and related products industry in Puerto Rico, to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1968 coverage classification.* (1) The minimum wage for this classification is $1.30 per hour through January 31, 1970; is $1.45 per hour after that date through January 31, 1971; and $1.60 per hour after that date.

(2) This classification is defined as all activities in the shoe and related products industry in Puerto Rico, to which section 6 of the Act applies only by reason of the Fair Labor Standards Amendments of 1966.

[32 FR 6445, Apr. 26, 1967, as amended at 34 FR 14329, Sept. 12, 1969]

§ 601.3 Notices.

Every employer subject to the provisions of § 601.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 601.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 2031, Mar. 2, 1963]

PART 602—LEATHER, LEATHER GOODS, AND RELATED PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
602.1 Definition.
602.2 Wage rates.
602.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 602.1 Definition.

The Leather, Leather Goods and Related Products Industry in Puerto Rico is defined as follows: (a) The curing, tanning, or other processing of hides, skins, leather, or furs, and the manufacture of products therefrom; the manufacture from artificial leather, fabric, plastics, paper or paperboard, or similar materials of trunks, suitcases, brief cases, wallets, billfolds, coin purses, card cases, key cases, cigarette cases, watch straps, pouches, tie cases, toilet kits, checkbook covers, sport and athletic gloves and mittens, belts (except fabric belts), and like articles; and the manufacture of baseballs, softballs, footballs and basketballs covered with leather, artificial leather, fabric, plastics, or similar materials: *Provided, however*, That the industry shall not include any product or activity included in the jewelry and mscellaneous products manufacturing industry; the women's outerwear, needlework, and miscellaneous fabricated textile products industry; the rubber footwear industry; the non-rubber footwear industry; the gloves and mittens industry; or the rubber and fabricated plastic products industry, as defined in the wage orders for those industries in Puerto Rico.

[40 FR 58138, Dec. 15, 1975]

§ 602.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications:* The classifications in this paragraph (a) apply to all activities in the industry to which Section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(1) *Hide curing classification.* (i) The minimum wage for this classification is $2.29 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the salting and other curing of hides and skins and operations incidental thereto, except when such operations are performed as an integral and continuous part of leather tanning.

(2) *Belts classification.* (i) The minimum wage for this classification is $2.29 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 on May 1, 1978 (section 6(c)(2).

(ii) This classification is defined as the manufacture of apparel belts made of leather, artificial leather, plastics, paper or paperboard, or similar materials (except fabric).

(3) *Sporting and athletic goods classification.* (i) The minimum wage for this classification is $2.25 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the manufacture of sporting and athletic goods, including but not limited to sport and athletic gloves and mittens and baseballs, softballs, and basketballs, covered with leather, artificial leather, fabric, plastics, or similar materials

(4) *Other products and activities classification.* (i) The minimum wage for this classification is $2.19 an hour through April 30, 1978. Under section 6(c) the rate will be increased to $2.30 on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the manufacture of all products and activities not included in any other pre-1961 coverage classification in the industry.

(b) *1961 coverage classification*: (1) The minimum wage for this classification is $2.30 an hour.

(2) This classification is defined as all activities in the industry which were brought within the purview of Section 6 of the Act solely by reason of the Fair Labor Standards Amendments of 1961.

(c) *1966 coverage classification*: (1) The minimum wage for this classification is $2.29 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 on May 1, 1978 (section 6(c)(2)).

(2) This classification is defined as all activities in the industry to which Section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[40 FR 58138, Dec. 15, 1975, as amended at 42 FR 57687, Nov. 4, 1977]

§ 602.3 Notices.

Every employer subject to the provisions of § 602.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 602.2 are working such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 6013, June 13, 1963]

PART 603—GLOVES AND MITTENS INDUSTRY IN PUERTO RICO

Sec.
603.1 Definition.
603.2 Wage rates.
603.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

Source: 36 FR 10866, June 4, 1971, unless otherwise noted.

§ 603.1 Definition.

The gloves and mittens industry in Puerto Rico is defined as: The manufacture from any material of gloves and mittens made by knitting, crocheting, cutting, sewing, embroidering, or other processes; *Provided, however*, That the industry shall not include the manufacture of sport and athletic gloves and mitts, or the manufacture of rubber or molded plastic gloves and mittens.

§ 603.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications:* The classifications in this paragraph (a) apply to all activities in the industry to which Section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(1) *Hand-sewing on fabric and leather gloves classification.* (i) The minimum wage for this classification is $1.65 an hour through April 30, 1978. Under section 6(c) the rate is increased by $0.15 an hour on May 1, 1978 and May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the operations of hand-sewing, hand-embroidering, hand-embellishing, ornamental hand-stitching, hand-drawing of threads, and similar hand operations involving decorative effects on fabric and leather gloves (gloves or mittens manufactured from woven or knitted fabric or leather or from leather in combination with other material), except mending, repairing, sewing of labels, tacking, and similar operations on fabric or leather gloves that are wholly or chiefly machine-sewn.

(2) *Other products and activities classification.* (i) The minimum wage for this classification is $2.25 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as all products and activities not included in the other pre-1961 coverage classification.

(b) *1961 coverage classification:* (1) The minimum wage for this classification is $2.30 an hour.

(2) This classification is defined as all activities of employees covered by Section 6 of the Act only by reason of the Fair Labor Standards Amendments of 1961.

(c) *1966 coverage classification:* (1) The minimum wage for this classification is $2.30 an hour.

(2) This classification is defined as all activities of employees covered by section 6 of the Act only by reason of

the Fair Labor Standards Amendments of 1966.

[40 FR 58139, Dec. 15, 1975, as amended at 42 FR 57688, Nov. 4, 1977]

§ 603.3 Notices.

Every employer subject to the provisions of § 603.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 603.2 are working such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 604—METAL, MACHINERY, TRANSPORTATION EQUIPMENT, AND ALLIED PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
604.1 Definition.
604.2 Wage rates.
604.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 604.1 Definition.

The Metal, Machinery, Transportation Equipment and Allied Products industry in Puerto Rico is defined as follows: The mining and other extraction of metal ore and the processing of such ore into metal; the manufacture (including repair) of any product, except furniture, or part made chiefly of metal; and the manufacture from any material of machinery, tools, transportation equipment and ordnance: *Provided, however,* That the industry shall not include the production of any basic material other than metal; the further processing of any basic material other than metal except when done by an establishment producing from such material a product of this industry or subassembly of such product; and any activity included in the jewelry and miscellaneous products manufacturing industry; the electrical, instrument, and related products industry; or the furniture and fixtures and lumber and wood products industry as defined in the wage orders for those industries in Puerto Rico.

[40 FR 36564, Aug. 21, 1975]

§ 604.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under sections 6(a) and 6(b) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum rate for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely, $2.30 an hour after December 31, 1975 (Section 6(c)(5).)

(2) This classification is defined as all activities in the industry to which Section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which Section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966. (Secs. 5, 6, 8, 52 Stat. 1062, as amended; 29 U.S.C. 205, 206, 208.)

[40 FR 36565, Aug. 21, 1975]

§ 604.3 Notices.

Every employer subject to the provisions of § 604.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 604.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 5496, June 5, 1963]

PART 606—ELECTRICAL, INSTRUMENT, AND RELATED PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
606.1 Definition.
606.2 Wage rates.
606.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 606.1 Definition.

The Electrical, Instrument, and Related Products Industry in Puerto Rico is defined as follows: The manufacture, assembling and repair of machinery, apparatus, equipment and supplies for the generation, storage, transmission, transformation and utilization of electrical energy; and the manufacture, assembly and repair of instruments, lenses, apparatus and equipment for scientific, professional, industrial measurement, photographic, ophthalmic, musical and horological purposes: *Provided, however,* That the industry shall not include industrial and commercial machinery powered by electric motors; measuring-and-dispensing pumps; ophthalmic frames; or any activity included in the stone, clay and glass products and non-metallic mining industry in Puerto Rico.

[40 FR 36565, Aug. 21, 1975]

§ 606.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under sections 6(a), 6(b) and 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications in this paragraph (a) apply to all activities in the industry to which Section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Single vision lens classification.* (i) The minimum wage for this classification is $2.09 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture of single vision lenses.

(2) *Other products and activities classification.* (i) The minimum wage for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely $2.30 an hour after December 31, 1975 (section 6(c)(5)).

(ii) This classification is defined as all products and activities in the pre-1966 coverage classifications other than single vision lenses.

(b) *1966 coverage classification.* (1)(i) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as all activities in the industry to which Section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[40 FR 36565, Aug. 21, 1975]

§ 606.3 Notices.

Every employer subject to the provisions of § 606.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 606.2 are working such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 5497, June 5, 1963]

PART 608—HANDKERCHIEF, SCARF, AND ART LINEN INDUSTRY IN PUERTO RICO

Sec.
608.1 Definition.
608.2 Wage rates.
608.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 27 FR 11459, Nov. 21, 1962, unless otherwise noted.

§ 608.1 Definition.

The handkerchief, scarf, and art linen industry in Puerto Rico is defined as follows: The manufacture of plain, scalloped, or ornamental handkerchiefs and scarves: the manufacture of art linen, including, but not by way of limitation, table cloths, luncheon cloths, altar cloths, napkins, bridge sets, table covers, sheets, pillow cases, and towels; and the manufacture of needlepoint on canvas or other materials: *Provided, however,* That the industry shall not include the outlining or embroidery of lace by machine or the embroidery of any article or trimming by a crochet beading process or with bullion thread.

§ 608.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any work-week is engaged in commerce or in production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications:* The classifications for which pre-1961 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(1) *Oblong scarves classification:* (i) The minimum wage for this classification is $2.00 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1, of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as all work in the handkerchief, scarf, and art linen industry in Puerto Rico on oblong scarves.

(2) *Other products and activities classification:* (i) The minimum wage for this classification is $1.40 an hour for the period ending April 30, 1976. Under section (c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as all products and activities not included in the oblong scarves classification of pre-1961 coverage.

(b) *1961 coverage classification.* (1) The minimum wage for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely $2.30 an hour after December 31, 1975 (section 6(c)(5)).

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

[40 FR 58139, Dec. 15, 1975]

§ 608.3 Notices.

Every employer subject to the provisions of § 608.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 608.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 609—WOMEN'S AND CHILDREN'S UNDERWEAR AND WOMEN'S BLOUSE INDUSTRY IN PUERTO RICO

Sec.
609.1 Definition.
609.2 Wage rates.
609.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 27 FR 11460, Nov. 21, 1962, unless otherwise noted.

§ 609.1 Definition.

The women's and children's underwear and women's blouse industry in Puerto Rico is defined as follows: The knitting or manufacture from woven or knit fabric, of women's, misses', girls', boys' size 6X or under, and infants' underwear and nighwear, including but not by way of limitation, slips, petticoats, nightgowns, negligees, panties, undershirts, briefs, shorts, pajamas, sleepers, and similar articles; and the manufacture of women's and misses' blouses, shirts, waists, and neckwear (including collar and cuff sets but excluding scarves): *Provided, however,* That the industry shall not include any product or activity included in the corsets, brassieres, and allied garments industry in Puerto Rico (Part 614 of this chapter); or the outlining or embroidery of lace by machine, or the embroidery of any article or trimming by a crochet beading process or with bullion thread.

§ 609.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classification.* (1) The minimum wage for this classification is $2.05 an hour through April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(b) *1961 coverage classification.* (1) The minimum wage for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely, $2.30 an hour after December 31, 1975 (section 6(c)(5)).

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

[40 FR 58140, Dec. 15, 1975, as amended at 42 FR 2955, Jan. 14, 1977]

§ 609.3 Notices.

Every employer subject to the provisions of § 609.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 609.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 610—CHILDREN'S DRESS AND RELATED PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
610.1 Definition.
610.2 Wage rates.
610.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 27 FR 12716, Dec. 22, 1962, unless otherwise noted.

§ 610.1 Definition.

The children's dress and related products industry in Puerto Rico is defined as follows; The manufacture from woven or knit fabric or from waterproof materials of the following garments: Dresses, blouses, shirts, and similar garments for girls; shirts and blouses for boys, size 6X and under; dresses, creepers, rompers, waterproof pants, diaper covers, bibs, sportswear, and play apparel for infants three years of age or under; and clothing and accessories for dolls: *Provided, however,* That the industry shall not include products manufactured by heat sealing, cementing, vulcanizing, or any operation similar thereto; or the outling or embroidery of lace by machine, or the embroidery of any article or trimming by a crochet beading process with bullion thread.

§ 610.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classification.* (1) The minimum wage for this classification is $2.05 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1, of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(b) *1961 coverage classification.* (1) The minimum wage for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely, $2.30 an hour after December 31, 1975 (section 6(c)(5)).

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $1.98 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

[40 FR 58140, Dec. 15, 1975]

§ 610.3 Notices.

Every employer subject to the provision of § 610.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 610.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 611—SWEATER AND KNIT SWIMWEAR INDUSTRY IN PUERTO RICO

Sec.
611.1 Definition.
611.2 Wage rates.
611.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 611.1 Definition.

The sweater and knit swimwear industry in Puerto Rico is defined as follows: The manufacture of men's, women's, misses', boys', and girls' knit sweaters, sport shirts, shrugs, shoulderettes, boleros, and similar knitwear, and women's, misses', and girls' knit swimwear: *Provided, however,* That the industry shall not include the embroidery of any article or trimming by a crochet beading process or with bullion thread.

[36 FR 14736, Aug. 11, 1971]

§ 611.2 Wage rates.

(a) Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(b) The minimum wage for this industry is $1.98 an hour for the period ending April 30, 1976. Under section

6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

[40 FR 58141, Dec. 15, 1975]

§ 611.3 Notices.

Every employer subject to the provisions of § 611.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 611.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[27 FR 11461, Nov. 21, 1962]

PART 612—WOMEN'S OUTERWEAR, NEEDLEWORK, AND MISCELLANEOUS FABRICATED TEXTILE PRODUCTS INDUSTRY IN PUERTO RICO

Sec.

612.1 Definition.
612.2 Wage rates.
612.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 612.1 Definition.

The Women's Outerwear, Needlework, and Miscellaneous Fabricated Textile Products Industry in Puerto Rico is defined as follows: The manufacture from any material of women's and girls' outerwear (except scarves, blouses, and girls' dresses) and all other apparel and apparel furnishings and accessories made by knitting, crocheting, cutting, sewing, embroidering, or other processes; and the manufacture of all textile products and the manufacture of like articles in which a synthetic material in sheet form is the basic component: *Provided, however,* That the industry shall not include any product or activity included in the jewelry and miscellaneous products manufacturing industry; the textile mill products industry; or any of the other apparel industries in Puerto Rico as defined in the wage orders for those industries in Puerto Rico.

[40 FR 58141, Dec. 15, 1975]

§ 612.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum wage for this classification is $2.00 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum wage for this classification is $1.99 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[40 FR 58141, Dec. 15, 1975]

§ 612.3 Notices.

Every employer subject to the provisions of § 612.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 612.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and

Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[36 FR 10867, June 4, 1971]

PART 613—JEWELRY AND MISCELLANEOUS PRODUCTS MANUFACTURING INDUSTRY IN PUERTO RICO

Sec.
613.1 Definition.
613.2 Wage rates.
613.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 613.1 Definition.

(a) The Jewelry and Miscellaneous Products Manufacturing Industry in Puerto Rico is defined as the manufacture of jewelry and jewelry products including the processing of natural or synthetic stone for jewelry or industrial use; the manufacture of artificial flowers except those made of molded plastic, party favors and similar products, straw, hair and related products; and all other manufacturing activities which are not included in the definitions of other manufacturing industries in Puerto Rico for which wage orders have been issued: *Provided, however,* That the industry shall not include any activity carried on by an establishment primarily engaged in another industry in Puerto Rico for its own use.

(b) This industry includes, but is not limited to, the manufacture of jewelry and jewelry findings; silverware, plated ware, and stainless steel ware; rosaries, beads, buttons, buckles, and hair ornaments and accessories; the processing of stones for jewelry or industrial use; the manufacture of flowers, buds, berries, foliage, leaves, fruits, plants, stems and branches which are commonly or commercially known as artificial; the manufacture of party favors and ornaments and decorations for holidays except those made of molded plastics or metal other than metallic chenille, foil or tinsel; and the manufacture of products made wholly or chiefly of straw, raffia, sisal, maguey, palm leaves, rushes, grasses, hair bristles, feathers and similar materials.

[42 FR 3303, Jan. 18, 1977]

§ 613.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under subsection 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the jewelry and miscellaneous products manufacturing industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Jewelry, novelty, decoration, straw, hair and related products sector of the industry*—(1) *Pre-1961 coverage classification.* The classifications for pre-1961 coverage apply to all activities in this sector of the industry to which section 6 of the Fair Labor Standards Act applied prior to the Fair Labor Standards Amendments of 1961.

(i) *Gem stone, industrial jewel and precious jewelry classification.* (A) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(B) This classification is defined as the sawing, cutting, grinding, polishing, and other processing of gem diamonds, other precious and semi-precious stones, synthetic stones used for decorative purposes, and natural or synthetic jewels for industrial use, including, but without limitation, jewel bearings, industrial diamonds, and the processing of precious and synthetic stones as components of phonograph needles and the attachment of such jewels to metal phonograph needle components, but not including the production of such metal components; and the manufacture of jewelry and other personal ornaments from precious metals with or without precious stones.

(ii) *Metal expansion watch band classification.* (A) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(B) This classification is defined as the fabrication or partial fabrication of metal expansion bands or expansion bracelets for watches or other uses.

(iii) *Hair ornaments and accessories classification.* (A) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(B) This classification is defined as the manufacture of combs, barrettes, bobby pins, hair clips, hair rollers, hair wavers, and other hair ornaments and accessories.

(iv) *Emblematic and military insignia classification.* (A) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(B) This classification is defined as the manufacture or partial manufacture of emblems and military insignia other than from precious metals.

(v) *Straw, hair and related products classification.* (A) The minimum rate for this classification is $2.00 an hour through April 30, 1977; $2.15 an hour effective May 1, 1977; and $2.30 an hour effective May 1, 1978, (section 6(c)(5)).

(B) This classification is defined as the manufacture of products made wholly or chiefly of straw, raffia, sisal, maguey, palm leaves, rushes, grasses, hair, bristles, feathers, and similar materials.

(vi) *Other related products and activities classification.* (A) The minimum rate for this classification is $2.30 an hour. Unless otherwide provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(B) This classification is defined as all products and activities not included in any other pre-1961 coverage classification in this sector of the industry, including but not limited to the manufacture or assembly of buttons and buckles, artificial flowers, decorations, party favors, rosaries and native and costume jewelry.

(2) *1961 coverage classification.* (i) The minimum rate for this classification is $2.30 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as all products and activities in this sector of the industry to which section 6 of the Act applies only by reason of the Fair Labor Standards Act Amendments of 1961.

(3) *1966 coverage classification.* (i) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely $2 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as all products and activities in this sector of the industry to which section 6 of the Act applies only by reason of the Fair Labor Standards Act Amendments of 1966.

(b) *Other miscellaneous products manufacturing sector of the industry*—(1) *Pre-1966 coverage classification.* (i) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as all manufacturing activities not included within the classifications of the jewelry, novelty, decoration, straw, hair and related products sector of this industry or the definitions of other manufacturing industries in Puerto Rico for which wage orders have been issued, to which section 6 of the Act applied prior to the Fair Labor Standards Act Amendments of 1966.

(2) *1966 coverage classification.* (i) The minimum wage rate for this classification is $1.75 an hour. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as all manufacturing activities not included within the classifications of the jewelry, novelty, decoration, straw, hair and related products sector of this industry or the definitions of other manufacturing industries in Puerto Rico for which wage orders have been issued, to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[39 FR 43537, Dec. 16, 1974, as amended at 42 FR 3303, Jan. 18, 1977]

§ 613.3 Notices.

Every employer subject to the provisions of § 613.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 613.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[37 FR 8872, May 2, 1972]

PART 614—CORSETS, BRASSIERES, AND ALLIED GARMENTS INDUSTRY IN PUERTO RICO

Sec.
614.1 Definition.
614.2 Wage rates.
614.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 27 FR 12367, Dec. 13, 1962, unless otherwise noted.

§ 614.1 Definition

The corsets, brassieres, and allied garments industry in Puerto Rico is defined as follows: The manufacture of corsets, brassieres, brassiere pads, girdles, foundation garments, sanitary belts, surgical or abdominal supports, and all similar body-supporting garments.

§ 614.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employes in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classification.* (1) The minimum rate for this classification is $1.98 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(b) *1961 coverage classification.* (1) The minimum wage for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely, $2.30 an hour after December 31, 1975 (section 6(c)(5)).

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

[40 FR 58142, Dec. 15, 1975]

§ 614.3 Notices.

Every employer subject to the provisions of § 614.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 614.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 615—MEN'S AND BOYS' CLOTHING AND RELATED PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
615.1 Definition.
615.2 Wage rates.
615.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 615.1 Definition.

The Men's and Boys' Clothing and Related Products Industry in Puerto Rico is defined as follows: The manufacture from any material of men's and boys' clothing, furnishings, accessories, and related products: *Provided, however,* That the industry shall not include the manufacture of handle made straw hats, gloves, hosiery, footwear, belts (except fabric), sweaters, handkerchiefs, scarves, mufflers, or any product or activity included in the children's dress and related products industry in Puerto Rico: the military hats and caps industry in Puerto Rico; or in the women's and children's underwear and women's blouse industry in Puerto Rico.

[40 FR 58142, Dec. 15, 1975]

§ 615.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications:* The classifications in this paragraph (a) apply to all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(1) *Work clothing and separate trousers classification.* (i) The minimum wage for this classification is $2.27 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the manufacture of men's, youths' and boys' work shirts, pants, and other work clothing and washable service apparel, and separate trousers and slacks.

(2) *Military-style hats and caps classification.* (i) The minimum wage for this classification is $2.25 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the manufacture of military-style hats and caps.

(3) *Hats and caps classification.* (i) The minimum wage for this classification is $2.15 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the manufacture of hats and caps other than military and military-style.

(4) *Other products and activities classification.* (i) The minimum wage for this classification is $2.20 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as all products and activities not included in the other pre-1961 coverage classifications.

(b) *1961 coverage classification:* (1) The minimum wage for this classification is $2.20 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(2) This classification is defined as all activities of employees covered by Section 6 of the Act only by reason of the Fair Labor Standards Amendments of 1961.

(c) *1966 coverage classifications:* The classifications in this paragraph (c) apply only to those activities in the industry to which Section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(1) *Trousers classification.* (i) The minimum wage for this classification is $2.24 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as the manufacture of men's, youths' and boys' work pants and separate trousers and slacks.

(2) *Other products and activities classification.* (i) The minimum wage for this classification is $2.27 an hour through April 30, 1978. Under section 6(c) the rate is increased to $2.30 an hour on May 1, 1978 (section 6(c)(2)).

(ii) This classification is defined as all products and activities not included in other 1966 coverage classifications.

[40 FR 58142, Dec. 15, 1975, as amended at 42 FR 57689, Nov. 4, 1977]

§ 615.3 Notices.

Every employer subject to the provisions of § 615.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 615.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[27 FR 12480, Dec. 18, 1962]

PART 617—MILITARY HATS AND CAPS INDUSTRY IN PUERTO RICO

Sec.
617.1 Definition.
617.2 Wage rates.
617.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

Source: 39 FR 43538, Dec. 16, 1974, unless otherwise noted.

§ 617.1 Definition.

The military hats and caps industry in Puerto Rico is defined as the manufacture of military hats and caps.

§ 617.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any work week is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 Coverage Classification:* (1) The minimum wage rate for this classification is $1.90 an hour. Pursuant to section 6(c)(2) of the Act, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached.

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 Coverage Classification:* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by

reason of the Fair Labor Standards Amendments of 1966.

§ 617.3 Notices.

Every employer subject to the provisions of § 617.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 617.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the United States Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 619—ALCOHOLIC BEVERAGE AND INDUSTRIAL ALCOHOL INDUSTRY IN PUERTO RICO

Sec.
619.1 Definition.
619.2 Wage rates.
619.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 27 FR 11461, Nov. 21, 1962, unless otherwise noted.

§ 619.1 Definition.

The alcoholic beverage and industrial alcohol industry in Puerto Rico, to which this part shall apply, is defined as follows: The manufacture, including, but without limitation, the distilling, rectifying, blending, or bottling of rum, gin, vodka, whisky, brandy, cordials, liqueurs, wines, ale, beer, and similar malt beverages with or without alcohol, other alcoholic beverages, industrial alcohol (such as amyl, butyl, and ethyl alcohol), acetone, antifreeze, and any related byproduct resulting from the manufacture of any of the foregoing products.

§ 619.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the alcoholic beverage and industrial alcohol industry in Puerto Rico who in any work week is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, as these terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum wage for this classification is $1.60 an hour.

(2) This classification is defined as all activities in the alcoholic beverage and industrial alcohol industry in Puerto Rico, to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum wage for this classification is $1.45 an hour for the period beginning February 1, 1970, and ending January 31, 1971; and $1.60 an hour thereafter.

(2) This classification is defined as all activities in the alcoholic beverage and industrial alcohol industry in Puerto Rico, to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[32 FR 6448, Apr. 26, 1967, as amended at 33 FR 5413, Apr. 5, 1968; 36 FR 221, Jan. 7, 1971]

§ 619.3 Notices.

Every employer subject to the provisions of § 619.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 619.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 657—TOBACCO MANUFACTURERS INDUSTRY IN PUERTO RICO

Sec.
657.1 Definition.
657.2 Wage rates.
657.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 657.1 Definition.

The tobacco industry in Puerto Rico is defined as the processing of leaf tobacco including, but without limitation, the grading, fermenting, stemming, chopping, packing, sorting, drying, and handling of tobacco; and the manufacture of cigarettes, cigars, cheroots, little cigars, snuff, chewing tobacco, and smoking tobacco.

[28 FR 7510, July 24, 1963]

§ 657.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under subsection 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the tobacco industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications.* The classifications for pre-1961 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(1) *Filler tobacco processing classification.* (i) The minimum wage for this classification is $1.56 an hour through April 30, 1977. Under section 6(c) of the Act, the rate is increased $.15 on May 1, 1977, and an additional $.15 on May 1 of each succeeding year until the mainland rate is reached.

(ii) This classification is defined as the processing of all filler tobaccos including, but without limitation, the grading, fermenting, hand stemming, packing, storing, drying, and handling of filler tobaccos prior to their use in the manufacture of cigars or other finished products, and including all activities performed as a necessary incident to such processing in the place of employment where such processing is carried on: *Provided, however,* That this classification shall not include such activities when they are performed as part of an integrated machine processing operation: *And, provided further,* That this classification shall not include the shredding, chopping, threshing, stemming of such tobaccos by machine and operations immediately incidental thereto.

(2) *Wrapper type tobacco processing classification.* (i) The minimum wage for this classification is $1.85 an hour through April 30, 1977. Under section 6(c) of the Act, the rate is increased $.15 on May 1, 1977, and an additional $.15 on May 1 of each succeeding year until the mainland rate is reached.

(ii) This classification is defined as the processing of cigar wrapper type tobacco including but without limitation, the bulking, dampening, sorting, sizing, tying, mulling, or fermenting, drying, packing, storing, and handling of such tobacco prior to its use in the manufacture of cigars or other finished tobacco products, and including all activities performed as a necessary incident to such processing in the place of employment where such processing is carried on: *Provided, however,* That the stemming of such tobacco by machine and operations immediately incidental thereto shall not be included.

(3) *Machine threshing, other operations classification.* (i) The minimum rate for this classification is $2.07 an hour through April 30, 1977. Under section 6(c) of the Act, the rate is increased $.15 on May 1, 1977, and an additional $.15 on May 1 of each succeeding year until the mainland rate is reached.

(ii) The classification is defined as all processing of tobacco preceding and subsequent to the shredding, chopping, or threshing of all types of tobacco by machine and drying and inspection operations immediately incidental thereto, when such preceding and subsequent processing is performed as a part of an integrated operation of machine shredding, chopping or threshing, and including all activities performed as a necessary incident to such processing in the place of employment where such processing is carried on.

(4) *Cigarette classification.* (i) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year

ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of cigarettes, and all operations incidental thereto.

(5) *Other products and activities classification.* (i) The minimum rate for this classification is $2.13 an hour through April 30, 1977. Under section 6(c) of the Act, the rate is increased $.15 on May 1, 1977, and an additional $.15 on May 1 of each succeeding year until the mainland rate is reached.

(ii) This classification is defined as the manufacture of cigars and and all other products and activities in the industry except products and activities included in any other classification in this industry.

(b) *1961 coverage classification.* (1) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities which were brought within the purview of section 6 of the Act solely by reason of the Fair Labor Standards Amendments of 1961.

(c) *1966 coverage classification.* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities which were brought within the purview of section 6 of the Act solely by reason of the Fair Labor Standards Amendments of 1966.

[28 FR 7510, July 24, 1963, as amended at 32 FR 6448, Apr. 26, 1967; 34 FR 15556, Oct. 7 1969; 36 FR 23626, Dec. 11, 1971; 39 FR 43539, Dec. 16, 1974; 42 FR 4440, Jan. 25, 1977]

§ 657.3 Notices.

Every employer subject to the provisions of § 657.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 657.2 are working such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[39 FR 43539, Dec. 16, 1974]

PART 661—BANKING, INSURANCE AND FINANCE INDUSTRY IN PUERTO RICO

Sec.
661.1 Definition of the industry.
661.2 Wage rates.
661.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064, 29 U.S.C. 205, 206, 208.

SOURCE: 21 FR 9965, Dec. 14, 1956, unless otherwise noted.

§ 661.1 Definition of the industry.

The banking, insurance and finance industry in Puerto Rico to which this part shall apply is defined as follows: The business, whether or not for profit, carried on by any banking, insurance, or other financial institution or enterprise.

§ 661.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the banking, insurance and finance industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed by an enterprise engaged in commerce or in the production of goods for commerce, as these terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which Section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[32 FR 6448, Apr. 26, 1967, as amended at 39 FR 43540, Dec. 16, 1974]

§ 661.3 Notices.

Every employer subject to the provisions of § 661.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 661.2 are working such notices of this order as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 670—THE CHEMICAL, PETROLEUM, AND RELATED PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
670.1 Definition.
670.2 Wage rates.
670.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

Source: 40 FR 16063, Apr. 9, 1975, unless otherwise noted.

§ 670.1 Definition.

The Chemical, Petroleum, and Related Products Industry in Puerto Rico is defined as follows:

(a) The manufacture or packaging of chemicals, drugs, medicines, toilet preparations, cosmetics, and related products; the mining or other extraction or processing of any mineral used in the production of the foregoing; and the mining or other extraction of petroleum, coal or natural gases and the manufacture of products therefrom: *Provided, however,* That the industry shall not include any activity included in the food and kindred products industry; the stone, clay and glass products and nonmetallic mining industry; and the metal, machinery, transportation equipment, and allied products industry, as defined in the wage orders for those industries, and any activities performed in the capacity of a public utility.

(b) The products of this industry include, among others: Primary plastic materials such as sheets, rods, tubes, filaments, granules, powders, and liquids; soap and glycerin; cleaning and polishing preparations; paints, varnishes, colors, dyes, inks, putty, and fillers; industrial alcohol, wood distillation and naval stores; fertilizers, vegetable and animal oils and fats; candles; glue and gelatin; compressed and liquified gases; insecticides and fungicides; salt, explosives, fireworks and pyrotechnics; coke and coke-oven by-products; paving mixtures and blocks containing asphalt, creosote, or tar; fuel briquettes; roofing felts and coatings; and asphalt tile and linoleum.

§ 670.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under sections 6(a) and 6(b) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum rate for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a)(1) now applies, namely, $2.30 an hour after December 31, 1975 (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

§ 670.3 Notices.

Every employer subject to the provisions of § 670.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 670.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 2031, Mar. 2, 1963]

PART 671—COMMUNICATIONS, UTILITIES, AND TRANSPORTATION INDUSTRY IN PUERTO RICO

Sec.
671.1 Definition.
671.2 Wage rates.
671.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 25 FR 5385, June 16, 1960, unless otherwise noted.

§ 671.1 Definition.

The communications, utilities, and transportation industry in Puerto Rico, to which this part shall apply, is defined as the industry carried on by any wire or radio system of communication, or by messenger service; by any concern engaged in the production and distribution of gas, electricity, or steam, the distribution of water, or the operation of sanitation facilities; and by any concern engaged in transportation for compensation by air, water, rail, motor vehicle, pipeline, or other means, or in related activities, including the operation of travel bureaus and ticket agencies, stevedoring, consolidate, forwarding, crating, and boxing: *Provided, however,* That the industry shall not include railroad transportation activities carried on by a producer of raw sugar, cane juice, molasses, refined sugar, and incidental by-products (or by any firm owned or controlled by or owning and controlling such producer, or by any firm owned or controlled by the parent company of such producer), where the railroad transportation activities are in whole or in part used for the production or shipment of these products, and any transportation activities by truck or other vehicle performed by a producer of these products in connection with the production or shipment of such products by such producer.

§ 671.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the communications, utilities, and transportation industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications for pre-1966 coverage apply to all activities in the industry to which Section 6 of Fair Labor Standards Act applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Radio broadcasting classifications.* (i) The minimum wage rate for this classification is $1.95 an hour. Pursuant to section 6(c)(2) of the Act, the wage rate in this section is in-

creased by $.15 an hour on May 1, 1975 when the mainland rate is reached. Beginning January 1, 1976, the rate is increased to $2.30 an hour (section 6(c)(5)).

(ii) This classification is defined as all activities involving the dissemination by radio to the public of aural programs.

(b) *Other activities classifications.* (1) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities that are not specifically included in the other pre-1966 coverage classification of the industry.

(c) *1966 coverage classification.* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[35 FR 18915, Dec. 12, 1970, as amended at 39 FR 43542, Dec. 16, 1974]

§ 671.3 Notices.

Every employer subject to the provisions of § 671.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 671.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor, and shall give such other notice as the Administrator may prescribe.

PART 672—BUSINESS, PROFESSIONAL, AND MISCELLANEOUS SERVICES INDUSTRY IN PUERTO RICO

Sec.
672.1 Definition.
672.2 Wage rates.
672.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 672.1 Definition.

The Business, Professional, and Miscellaneous Services Industry in Puerto Rico is defined as the activity carried on by any business or nonprofit enterprise performing real estate, professional, advertising, education, or research activities, or engaged in the furnishing of other facilities or services to industrial or commercial establishments or to the consumer; and the production of photographs and blueprints, the production and distribution of motion pictures and all activities incidental thereto; and all nonmanufacturing activities which are not included in the definitions of other industries in Puerto Rico for which wage orders have been issued: *Provided, however,* That the industry shall not include any activity carried on by an establishment primarily engaged in another industry in Puerto Rico for its own use.

[39 FR 43542, Dec. 16, 1974]

§ 672.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications for pre-1966 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Watching, protective and janitorial services classification.* (i) The minimum wage rate for this classification is $2.15 an hour through January 31, 1977. On February 1, 1977, the wage rate in this section is increased to $2.30 an hour.

(ii) This classification is defined as all activities of establishments providing personnel for detective, investigative, patrolling, watching or personnel protection services, including the maintenance and monitoring of mechanical protective devices; and all activities of establishments engaged in furnishing cleaning and maintenance services such as janitorial, floor waxing and office cleaning.

(2) *Other activities classification.* (i) The minimum rate for this classification is $2 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as all activities that are not specifically included in the other pre-1966 coverage classification of the industry.

(b) *1966 Coverage Classification:* The classifications for 1966 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(1) *Watching, protective and janitorial services classification.* (i) The minimum wage rate for this classification is $1.85 an hour. Pursuant to section 6(c)(2) of the Act, the wage rate in this section is increased by $.15 an hour on May 1, 1975, when the mainland rate is attained. Beginning January 1, 1976, pursuant to section 6(b) of the Act, the rate is increased to $2.20 an hour, and beginning January 1, 1977, the rate increases to $2.30 an hour.

(ii) This classification is defined as all activities of establishments providing personnel for detective, investigative, patrolling, watching or personnel protection services, including the maintenance and monitoring of mechanical protective devices; and all activities of establishments engaged in furnishing cleaning and maintenance services such as janitorial, floor waxing and office cleaning.

(2) *Other activities classification.* (i) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c) (5)).

(ii) This classification is defined as all activities that are not specifically included in the other 1966 coverage classification of the industry.

[39 FR 43542, Dec. 16, 1974, as amended at 42 FR 2955, Jan. 14, 1977]

§ 672.3 Notices.

Every employer subject to the provisions of § 672.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 672.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[36 FR 427, Jan. 13, 1971]

PART 673—THE FOOD AND KINDRED PRODUCTS INDUSTRY

Sec.
673.1 Definition.
673.2 Wage rates.
673.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 673.1 Definition.

The canning, preserving (including freezing, drying, curing, pickling, and similar processes), or other manufacturing or processing, and the packaging in conjunction therewith, of foods, ice, alcoholic and nonalcoholic beverages, the handling, grading, packing, or preparing in their raw or natural state of fresh vegetables, fresh fruits, nuts, or edible field crops, and the gathering of wild plant or animal life; the production of raw sugar cane juice, molasses, and refined sugar, and incidental by-products, and all railroad transportation activities carried on by a producer of any of these products (or by any firm owned or controlled by, or owning and controlling such producer, or by any firm owned or controlled by the parent company of such producer) where the railroad transportation activities are in whole or in part used for the production or shipment of the products of the industry, and any transportation activities by truck, vessel, or other vehicle performed by a producer of products of such producer: *Provided, however,* That the industry shall not include any product or activity included in the chemical, petroleum, and related products industry or any transportation activity covered by the wage order for the communications, utilities, and transportation industry, or any transportation activity in which the agricultural exemption contained in section 13(a) of the Act was applicable prior to February 1, 1967 and *provided, further,* That the industry shall not include sugar and other food manufacturing activities covered by the wage order for the government service industry. The industry includes, but is not limited to, the manufacture or processing of meat products, poultry and poultry products, milk and dairy products, fish and seafood products, fruit and vegetable products, grains, and grain products, sugar and confectionery products, fats and oils, bakery products, beverages, and miscellaneous food preparations and kindred products.

[42 FR 2955, Jan. 14, 1977]

§ 673.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications for pre-1966 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Alcoholic beverage classification.* (i) The minimum wage rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975 and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture, including, but without limitation, the distilling, rectifying, blending, or bottling of rum, gin, vodka, brandy, cordials, liqueurs, wines, ale, beer, and similar malt beverages with or without alcohol, and other alcoholic beverages.

(2) *Yeast and canned tuna fish classification.* (i) The minimum wage rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975 and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of yeast, and the cooking and canning of tuna fish and of tuna-like fish and the manufacture of by-products therefrom.

(3) *Biscuit, cracker and bread, rice and lard, and animal feeds classification.* (i) The minimum wage rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975 and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of biscuits, crackers, such as saltines, crackers known as rositas or vanilla crackers, and like products; pastry and cakes, bread and rolls; processing and packaging of rice and lard; and the manufacture of mixed feeds for poultry and cattle.

(4) *Soft drink and ice cream, ices and similar frozen products classification.* (i) The minimum wage rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture and distribution of soft drinks and ice cream, ices and similar frozen products.

(5) *Milk processing and distribution classification.* (i) The minimum wage rate for this classification is $2.13 an hour through April 30, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached (section 6(c).

(ii) This classification is defined as the collecting, pasteurizing, homogenizing and distributing of milk.

(6) *Candy and gum products classification for pre-1961 coverage.* (i) The minimum wage rate for this classification is $2.13 an hour through April 30, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as all activities of establishments manufacturing candy and gum products to which section 6 of the Fair Labor Standards Act applied prior to the Fair Labor Standards Amendments of 1961.

(7) *Candy and gum products classification for 1961 coverage.* (i) The minimum wage rate for this classification is $2.13 an hour through April 30, 1977. Under section 6(c) the rate will be increased by $.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as all activities of establishments manufacturing candy and gum products to which section 6 of the Fair Labor Standards Act applies solely by reason of the Fair Labor Standards Amendments of 1961.

(8) *Other products and activities classification.* (i) The minimum wage rate for this classification is $2.23 an hour through April 30, 1977. The rate is increased to $2.30 an hour on May 1, 1977, by reason of section 6(c)(2).

(ii) This classification is defined as all products and activities that are not included in any other pre-1966 coverage classification for the industry.

(b) *1966 coverage classifications.* The classifications of 1966 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(1) *Alcoholic beverage classification.* (i) The minimum wage rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture, including, but without limitation, the distilling, rectifying, blending, or bottling of rum, gin, vodka, brandy, cordials, liqueurs, wines, ale, beer, and similar malt beverages with or without alcohol, and other alcoholic beverages.

(2) *Yeast and canned tuna fish classification.* (i) The minimum wage rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of yeast, and the cooking and canning of tuna fish and of tunalike fish and the manufacture of by-products therefrom.

(3) *Biscuit, cracker and bread, rice and lard, and animal feeds classification.* (i) The minimum wage rate for this classification is $1.90 an hour for

the period ending December 31, 1974. Since the mainland rate has been attained the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of biscuits, crackers, such as saltines, crackers known as rositas or vanilla crackers, and like products; pastry and cakes, bread and rolls; processing and packaging of rice and lard; and the manufacture of mixed feeds for poultry and cattle.

(4) *Soft drink and ice cream, ices and similar frozen products classification.* (i) The minimum wage rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture and distribution of soft drinks and ice cream, ices and similar frozen products.

(5) *Milk processing and distribution classification.* (i) The minimum wage rate for this classification is $2.13 an hour through April 30, 1977. Under section 6(c) the rate will be increased by $.15 an hour on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2).

(ii) This classification is defined as the collecting, pasteurizing, homogenizing and distributing of milk.

(6) *Candy and gum products classification.* (i) The minimum wage rate for this classification is $2.13 an hour through April 30, 1977. Under section 6(c) the rate will be increased by $.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture of candy and gum products.

(7) *Other products and activities classifications.* (i) The minimum wage rate for this classification is $1.85 an hour. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as all products and activities that are not included in any other 1966 coverage classification for the industry.

[39 FR 42354, Dec. 5, 1974, as amended at 42 FR 2955, Jan. 14, 1977]

§ 673.3 Notices.

Every employer subject to the provisions of § 673.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 673.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 2988, Mar. 27, 1963]

PART 675—FURNITURE AND FIXTURES AND LUMBER AND WOOD PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
675.1 Definition.
675.2 Wage rates.
675.3 Notices.

AUTHORITY: Secs. 5 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 675.1 Definition.

(a) The furniture and fixtures and lumber and wood products industry is defined as the manufacture of household, office, public building, and restaurant furniture, and office and store fixtures; and the manufacture of products made from lumber, wood and related materials; and logging and wood preserving: *Provided, however,* That the industry shall not include any product or activity in the metal, machinery, transportation equipment, and allied products industry; the jewelry and miscellaneous products manufacturing industry; the construction industry; or the paper, paper products, printing and publishing industry.

(b) The industry includes, without limitation, furniture, office and store fixtures, mattresses and bedsprings, boxes and containers, cooperage, window and door screens and blinds, caskets and coffins, matches, sawmill products, planning and plywood mill products, charcoal, trays, bowls, and other woodenware; excelsior, cork, bamboo, rattan, and willowware articles.

[39 FR 43540, Dec. 16, 1974, as amended at 42 FR 18065, Apr. 5, 1977]

§ 675.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum wage rate for this classification is $2.30 an hour. Unless otherwise provided the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum wage rate for this classification is $2.30 an hour. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as the occupations of craft masters and supervisors in the manufacture of table tops and kitchen cabinets made wholly or chiefly of wood and who are covered by the Act only by reason of the Fair Labor Standards Amendments of 1961 in the lumber and wood products industry in Puerto Rico.

[30 FR 2792, Mar. 4, 1965, as amended at 39 FR 43540, Dec. 16, 1974; 42 FR 18065, Apr. 5, 1977]

§ 675.3 Notices.

Every employer subject to the provisions of § 675.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 675.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[39 FR 43540, Dec. 16, 1974]

PART 677—PAPER, PAPER PRODUCTS, PRINTING, AND PUBLISHING INDUSTRY IN PUERTO RICO

Sec.

677.1 Definition.
677.2 Wage rates.
677.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 677.1 Definition.

The paper, paper products, printing and publishing industry in Puerto Rico is defined as follows: The manufacture of pulp from woods, rags, bagasse, and other fibers; the conversion of such pulp into paper, paperboard, and building board; the manufacture of paper, paperboard, and pulp into bags, boxes, containers, tags, cards, envelopes, pressed and molded pulp goods, and all other converted paper products; the printing performed on the foregoing and on allied products; the printing or publishing of newspapers, books, periodicals, maps, and music; and all manufacturing and service operations performed by typesetters, advertising typographers, electrotypers, stereotypers, photoengravers, steel and copper plate engravers, commercial printers, lithographers, gravure printers, private printing plants of concerns engaged in other business, binderies, and news syndicates: *Provided, however,* That the industry shall not include any product or activity included in the leather, leather goods, and related products industry (Part 602 of this chapter).

[37 FR 14874, July 26, 1972]

677.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $1.45 an hour for the period ending January 31, 1971; and $1.60 an hour thereafter.

(2) This classification is defined as all activities in paper, paper products, printing, and publishing industry in Puerto Rico, to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[30 FR 3709, Mar. 20, 1965, as amended at 35 FR 5689, Apr. 8, 1970; 39 FR 43541, Dec. 16, 1974]

§ 677.3 Notices.

Every employer subject to the provisions of § 677.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 677.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[28 FR 5017, May 18, 1963]

PART 678—STONE, CLAY AND GLASS PRODUCTS AND NONMETALLIC MINING INDUSTRY IN PUERTO RICO

Sec.
678.1 Definition.
678.2 Wage rates.
678.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

Source: 39 FR 43541, Dec. 16, 1974, unless otherwise noted.

§ 678.1 Definition.

The stone, clay and glass products and nonmetallic mining industry in Puerto Rico is defined as the manufacture from nonmetallic mineral products such as, but not limited to, structural clay products, china, pottery, tile and other ceramic products and refractories; glass and glass products (except lenses); dimension and cut stone; crushed stone; sand and gravel; hydraulic cement; abrasives, lime, concrete, gypsum, mica, plaster and asbestos; and the mining, quarrying, or other extraction and further processing of nonmetallic minerals, except chemical and fertilizer minerals and fossil fuels: *Provided, however,* That the industry shall not include any product or activity included in the jewelry and miscellaneous products manufacturing industry; the construction industry; the metal, machinery, transportation equipment and allied products industry; or the chemical, petroleum and related products industry.

§ 678.2 Wage rates.

Wages at a rate not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications.* The classifications for pre-1961 coverage apply to all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(1) *Vitreous and semivitreous china food utensils classification.* (i) The minimum wage for this classification is $2.13 an hour for the period ending April 30, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977 and an additional $0.15 on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture of vitreous and semivitreous china table and kitchen articles for use in households and hotels, restaurants and other commercial institutions for preparing, serving or storing food or drink, except that this classification does not include products in the art pottery classification.

(2) *Art pottery classification.* (i) The minimum wage for this classification is $1.70 an hour for the period ending April 30, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977 and an additional $0.15 on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture of hand-decorated pottery.

(3) *Other products and activities classification.* (i) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(b) *1961 coverage classification.* (1) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1961.

(c) *1966 coverage classification.* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c) (5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[30 FR 3709, Mar. 20, 1955, as amended at 39 FR 43541, Dec. 16, 1974; 42 FR 18065, Apr. 5, 1977]

§ 678.3 Notices.

Every employer subject to the provisions of § 678.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 678.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 683—WHOLESALING AND WAREHOUSING INDUSTRY IN PUERTO RICO

Sec.
683.1 Definition.
683.2 Wage rates.
683.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 36 FR 428, Jan. 13, 1971, unless otherwise noted.

§ 683.1 Definition.

The wholesaling and warehousing industry in Puerto Rico is defined as follows: The wholesaling, warehousing, and other distribution of commodities, including, but without limitation, the wholesaling, warehousing, and other distribution activities of jobbers, importers and exporters, manufacturers' sales branches and offices engaged in distributing products manufactured outside of Puerto Rico, industrial distributors, brokers and agents, and public warehouses: *Provided, however,* That the industry shall not include the activities of employees who are engaged in wholesaling, warehousing, and other distribution of products manufactured by their employer in Puerto Rico, or any activities included in the definition of the Communications, Utilities and Transportation Industry in Puerto Rico (Part 671 of this chapter), or in the definition of the Tobacco Industry in Puerto Rico (Part 657 of this chapter), or in the definition of the Food and Related Products Industry in Puerto Rico (Part 673 of this chapter).

§ 683.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum rate for this classification is $2.00 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c) (5)).

(2) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[36 FR 428, Jan. 13, 1971, as amended at 39 FR 43543, Dec. 16, 1974]

§ 683.3 Notices.

Every employer subject to the provision of § 683.2 shall post in a conspicuous place in each department of his estabishment where employees subject to the provisions of § 683.2 are working such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 687—HOSIERY INDUSTRY IN PUERTO RICO

Sec.
687.1 Definition.
687.2 Wage rates.
687.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 687.1 Definition.

The Hosiery Industry in Puerto Rico is defined as follows: (a) The manufacture and processing of hosiery, including, among other processes, the knitting, seaming, looping, dyeing, clocking, and all phases of finishing hosiery, but not including the manufacture or processing of yarn or thread.

[40 FR 58143, Dec. 15, 1975]

§ 687.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications in this paragraph (a) apply to all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Women's hosiery classification.* (i) The minimum wage for this classification is $1.88 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture and processing of women's hosiery, both seamless and full-fashioned, including among other processes knitting, seaming, looping, dyeing, clocking, and all phases of finishing.

(2) *Other hosiery classification.* (i) The minimum wage for this classification is $1.67 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture of all other hosiery, including men's and children's hosiery and women's socks, and involving such processes as knitting, seaming, looping, dyeing, clocking, and all phases of finishing.

(b) *1966 coverage classifications.* The classifications in this paragraph (b) apply only to those activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(1) *Women's hosiery classification.* (i) The minimum wage for this classification is $1.88 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the manufacture and processing of women's hosiery, both seamless and full-fashioned, including among other processes knitting, seaming, looping, dyeing, clocking, and all phases of finishing.

(2) *Other hosiery classification.* (i) The minimum wage for this classification is $1.695 an hour for the period ending April 30, 1976. Under section 6(c) the rate will be increased by $.15 an hour on May 1, 1976 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as all activities in the hosiery industry, except those activities included in the women's hosiery classification.

[40 FR 58143, Dec. 15, 1975]

§ 687.3 Notices.

Every employer subject to the provisions of § 687.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 687.2 are working such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[27 FR 10099, Oct. 13, 1962]

PART 689—SUGAR MANUFACTURING INDUSTRY IN PUERTO RICO

Sec.
689.1 Definition.
689.2 Wage rates.
689.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208, unless otherwise noted.

§ 689.1 Definition.

The sugar manufacturing industry in Puerto Rico is defined as follows: The production of raw sugar, cane juice, molasses and refined sugar, and incidental byproducts; all railroad transportation activities carried on by a producer of any of these products (or by any firm owned or controlled by, or owning and controlling such producer, or by any firm owned or controlled by the parent company of such producer) where the railroad transportation activities are in whole or in part used for the production or shipment of the products of the industry; and any transportation activities by truck, vessel, or other vehicle performed by a producer of products of the industry in connection with the production or shipment of such products by such producer: *Provided, however,* That the industry shall not include any transportation activity covered by the wage order for the communications, utilities, and transportation industry in Puerto Rico (Part 671 of this chapter), or any transportation activity to which the agricultural exemption contained in section 13(a) of the Act was applicable prior to February 1, 1967.

[32 FR 4408, Mar. 23, 1967]

§ 689.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by each employer to each of his employees in each of the classifications in the sugar manufacturing industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as these terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classification.* (1) The minimum rate for this classification is $1.55 an hour.

(2) This classification includes all activities in the sugar manufacturing industry in Puerto Rico, to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(b) *1966 coverage classification.* (1) The minimum rate for this classification is $1.55 an hour.

(2) This classification is defined as all activities in the sugar manufacturing industry in Puerto Rico, to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(Reorg. Plan. No. 6 of 1950; 3 CFR, 1949-1953 Comp. p. 1004, Adm. Order No. 612; 35 FR 1020)

[32 FR 6449, Apr. 26, 1967, as amended at 35 FR 9108, June 12, 1970; 37 FR 14875, July 26, 1972]

§ 689.3 Notices.

Every employer subject to the provisions of § 689.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 689.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[27 FR 11461, Nov. 21, 1962]

PART 690—FABRICATED PLASTIC PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
690.1 Definition.
690.2 Wage rates.
690.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 690.1 Definition.

The Fabricated Plastic Products Industry in Puerto Rico is defined as follows: The molding, extrusion, lamination, or other forming, and the fabrication of plastic products: *Provided, however,* That the industry shall not include the manufacture from plastic materials of footwear and cut stock and findings for footwear; the manufacture of apparel and apparel furnishings and accessories; and any activity included in the rubber and plastics footwear industry (29 CFR Part 730), the jewelry decorations, brushes and novelties industry (29 CFR Part 613), the leather, leather goods, and related products industry (29 CFR Part 602), the women's outerwear, needlework, and miscellaneous fabricated textile products industry (29 CFR Part 612), and the chemical, petroleum, and related products industry (29 CFR Part 670), as defined in the wage orders for those industries in Puerto Rico.

[39 FR 13271, Apr. 12, 1974]

§ 690.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications.* The classifications in this paragraph (a) apply to all activities in the industry to which section 6 of the Act applies without reference to the Fair Labor Standards Amendments of 1961.

(1) *Dinnerware, sprayer, and vaporizer classification.* (i) The minimum wage for this classification is $1.60 an hour.

(ii) This classification is defined as consisting of the manufacture of plastic dinnerware, plastic sprayers, plastic vaporizers, and plastic atomizers.

(2) *Phonograph record classification.* (i) The minimum wage for this classification is $1.60 an hour.

(ii) This classification is defined as the manufacture of phonograph records.

(3) *Plastic pipe and pipe fittings classification.* (i) The minimum wage for this classification is $1.50 an hour.

(ii) This classification is defined as the manufacture or assembly of plastic pipe and plastic pipe fittings.

(4) *Other products and activities classification.* (i) The minimum wage for this classification is $1.35 an hour.

(ii) This classification is defined as the manufacture or assembly of all products and activities that are not specifically included in any other pre-1961 coverage classification.

(b) *1961 coverage classification.* This classification for 1961 coverage applies to all activities of employees in this industry to which section 6 of the Act applies only by reason of the Fair Labor Standards Amendments of 1961.

(1) *Artificial flowers made from molded plastics.* (i) The minimum wage for this classification is $1.60 an hour.

(ii) This classification is defined as the manufacture of artificial flowers made from molded plastics.

(2) *Other products and activities classification.* (i) The minimum wage for this classification is $1.34 an hour.

(ii) This classification is defined as the manufacture or assembly of all products and activities that are not specifically included in any other 1961 coverage classification of the industry.

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $1.60 an hour.

(2) This classification is defined as all activities in the fabricated plastic products industry in Puerto Rico, to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[37 FR 8873, May 2, 1972; 37 FR 10725, May 27, 1972; 37 FR 12491, June 24, 1972]

§ 690.3 Notices.

Every employer subject to the provisions of § 690.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 690.2 are working, such notice of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[37 FR 8873, May 2, 1972]

PART 694—MINIMUM WAGE RATES IN INDUSTRIES IN THE VIRGIN ISLANDS

Sec.
694.1 Wage rates.
694.2 Notices.

§ 694.1 Wage rates.

Every employer shall pay to each of his employees in the Virgin Islands, who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in any enterprise engaged in commerce or in the production of goods for commerce or is employed in domestic service, as these terms are defined in section 3 of the Fair Labor Standards Act of 1938, wages at a rate not less than the minimum rate or rates of wages prescribed in this section for the classification in which such employee is engaged. However, the provisions of this wage order shall not apply with respect to the minimum wage rate of any employee employed in the Virgin Islands by the United States or by the government of the Virgin Islands, by an establishment which is a hotel, motel, or restaurant, or by any retail or service establishment which employed such employee primarily in connection with the preparation or offering of food and beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guest of members of clubs. The minimum wage rate of such an employee shall be determined under the Fair Labor Standards Act of 1938 in the same manner as the minimum wage rate for employees employed in the 50 States is determined.

(a) *Pre-1966 coverage classifications.* The classifications for pre-1966 coverage apply to all activities of employees in the Virgin Islands which were within the purview of section 6 of the Fair Labor Standards Act of 1938 prior to the effective date of the Fair Labor Standards Amendments of 1966.

(1) *Watch assembly classification.* (i) The minimum wage rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on December 1, 1977.

(ii) This classification is defined as the assembly of watches and watch movements including related repair work.

(2) *Milk processing classification.* (i) The minimum wage rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as the processing or recombining of fluid milk and cream for wholesale or retail distribution.

(3) *Retailing, wholesaling and warehousing classification.* (i) The minimum wage rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as all activities in connection with the selling of goods or services at retail, including the operation of retail stores and other retail establishments, the wholesaling and warehousing, and other distribution of commodities: *Provided, however,* That this classification shall not include retailing and/or wholesaling activities included within other wage order classifications in the Virgin Islands: *Provided, further,* That this classification shall not include food service activities in retail establishments.

(4) *Construction classification.* (i) The minimum wage rate for this classification is $1.85 an hour. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as all construction, reconstruction, structural renovation and demolition, on public or private account, of buildings,

90-097 O—82——22

housing, highways or streets, catchments, dams and any other structures.

(5) *Shipping and seamen classification.* (i) The minimum wage rate for this classification is $1.85 an hour. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as the transportation of passengers and cargo by water and all activities in connection therewith, including storage and lighterage operations, and the activities of seamen on United States vessels.

(6) *Miscellaneous manufacturing activities classification.* (i) The minimum wage rate for this classification is $1.85 an hour. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c) (2) of the Act.

(ii) This classification is defined as all manufacturing activities in the Virgin Islands covered by the Fair Labor Standards Act prior to the Fair Labor Standards Amendments of 1966, with the exception of the assembly of watches and watch movements, milk processing, the manufacture of petroleum products, pharmaceuticals and toiletries, textiles and textile products, alcholic beverages, and the processing of bauxite to extract alumina and the further processing related to the production of aluminum.

(7) *Other products and activities classification.* (i) The minimum wage rate for this classification is $2.10 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rate specified in section 6(a) (1) now applies, namely $2.30 an hour after December 31, 1975.

(ii) This classification is defined as the manufacture of petroleum products, pharmaceuticals and toiletries, textiles and textile products, alcoholic beverages, and the processing of bauxite to extract alumina and the further processing related to the production of aluminum and all other non-manufacturing activities of employees in the Virgin Islands covered by the Fair Labor Standards Act other than those activities included in any other pre-1966 coverage classifications.

(b) *1966 coverage classifications.* The classification for 1966 coverage includes only those activities of employees in the Virgin Islands which were brought within the purview of section 6 of the Fair Labor Standards Act of 1938 by the Fair Labor Standards Amendments of 1966 or by section 906 of the Education Amendments of 1972.

(1) *Agriculture classification.* (i) The minimum wage for this classification is $1.72 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.02 an hour on November 1, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1978 and on May 1 of each subsequent year until the mainland rate is reached.

(ii) This classification is defined as farming in all its branches, including the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including the preparation for market, delivery to storage or to market or to the carries for transportation to market; processing, handling, packing, storing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or making cheese or butter or other dairy products; the operation of a country elevator, including such an establishment which sells products and services used in the operation of a farm; the ginning of cotton for market; and the transportation and preparation for transportation of fruits and vegetables, whether or not performed by a farmer, from the farm to a place of first processing or first marketing.

(2) *Retailing, wholesaling and warehousing classification.* (i) the minimum wage rate for this classification

is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as all activities in connection with the selling of goods or services at retail, including the operation of retail stores and other retail establishments, the wholesaling and warehousing and other distribution of commodities: *Provided, however,* That this classification shall not include retailing and/or wholesaling activities included within other wage order classifications in the Virgin Islands: *Provided, further,* That this classification shall not include food service activities in retail establishments.

(3) *Construction classification.* (i) The minimum rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as all construction, reconstruction, structural renovation and demolition, on public or private account, of buildings, housing, highways or streets, catchments, dams and any other structures.

(4) *Laundry and cleaning classification.* (i) The minimum wage rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as the laundering, dry cleaning, and incidental work such as repair of clothing and fabrics on which such work is done and the work done in family and commercial power laundries, linen supply and industrial laundries, diaper services, self-service laundries, hand laundries, cleaning and dyeing plants and rug cleaning and repairing plants.

(5) *Manufacturing activities classification.* (i) The minimum rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as all manufacturing activities in the Virgin Islands covered by the Fair Labor Standards Act solely by reason of the Fair Labor Standards Amendments of 1966.

(6) *Other activities classification.* (i) The minimum wage rate for this classification is $2.00 an hour for the period ending December 31, 1975. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely $2.20 during the year beginning January 1, 1976 and $2.30 an hour after December 31, 1976.

(ii) This classification is defined as all activities of employees in the Virgin Islands, including the activities of those pre-school employees which were brought within the purview of section 6 of the Fair Labor Standards Act by section 906 of the Education Amendments of 1972, other than those activities included in any other 1966 coverage classification.

(c) *1974 coverage classifications.* The classifications for 1974 coverage include only those activities of employees in the Virgin Islands which were brought within the purview of section 6 of the Fair Labor Standards Act of 1938 by the Fair Labor Standards Amendments of 1974.

(1) *Domestic service classification.* (i) The minimum wage rate for this classification is $1.50 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $1.80 an hour on November 1, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1978 and on May 1 of each subsequent year until the mainland rate is reached.

(ii) This classification is defined as service of a household nature performed by an employee in or about the private home of the person by whom he or she is employed. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling maintained by an individual or a family in an apartment house or hotel may constitute a private home. However, a dwelling primarily used as a boarding or lodging house for the purpose of supplying such services to the public as a business enterprise is not a private home. Domestic service in and about a private home includes, but is not limited to, services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms and chauffeurs.

(2) *Motion picture theater classification.* (i) The minimum wage rate for this classification is $2.10 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as the activities of employees of motion picture theaters.

(3) *Retail and service employees classification.* (i) The minimum wage rate for this classification is $2.05 an hour. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977. The rate will increase to $2.30 an hour on November 1, 1977.

(ii) This classification is defined as the activities of employees employed in retail and service establishments that are parts of covered enterprises and that have an annual volume of sales that is less than $250,000, but not less than $225,000 after January 1, 1975, and is not less than $200,000 after January 1, 1976, and in any amount after January 1, 1977. (Retail and service establishments with $250,000 or more in an annual sales volume are covered under the pre-1974 provisions of the Fair Labor Standards Act of 1938).

(4) *Small telegraph agencies classifications.* (i) The minimum wage rate for this classification is $1.90 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) of the Act now apply, namely, $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year beginning January 1, 1976; and $2.30 an hour after December 31, 1976.

(ii) This classification is defined to include employees engaged in handling telegraphic messages for the public where revenue does not exceed $500 a month.

(5) *Processing of shade-grown tobacco classification.* (i) The minimum wage rate for this classification is $1.60 an hour for the period ending December 31, 1974. Since the mainland rate has been attained the rates specified in section 6(a)(5) now apply, namely, $1.80 an hour during the year beginning January 1, 1975; $2.00 an hour during the year beginning January 1, 1976; $2.20 an hour during the year beginning January 1, 1977; and $2.30 an hour after December 31, 1977.

(ii) This classification is defined to include agricultural employees engaged in processing shade-grown tobacco prior to stemming.

(6) *Small logging operations classification.* (i) The minimum wage rate for this classification is $1.60 an hour for the period ending December 31, 1974. Since the mainland rate has been attained the rates specified in section 6(a)(5) now apply, namely, $1.80 an hour during the year beginning January 1, 1975; $2.00 an hour during the year beginning January 1, 1976; $2.20 an hour during the year beginning January 1, 1977; and $2.30 an hour after December 31, 1977.

(ii) This classification is defined to include employees in forestry or lumbering operations where the number of employees is eight or less.

(7) *Agricultural employees of large conglomerates.* (i) The minimum wage rate for this classification is $1.60 an hour for the period ending December 31, 1974. Since the mainland rate has been attained the rates specified in section 6(a) (5) now apply, namely, $1.80 an hour during the year beginning January 1, 1975; $2.00 an hour during the year beginning January 1, 1976; $2.20 an hour during the year beginning January 1, 1977; and $2.30 an hour after December 31, 1977.

(ii) This classification is defined to include agricultural employees of conglomerates with an annual gross volume of sales exceeding $10,000,000 regardless of the number of employees engaged in agriculture.

(Secs. 5, 6, 7, 8, 13, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 207, 208)

[40 FR 15875, Apr. 8, 1975, as amended at 40 FR 26031, June 20, 1975; 42 FR 18589, Apr. 8, 1977]

§ 694.2 Notices.

Every employer subject to the provisions of the Fair Labor Standards Act of 1938 shall post in a conspicuous place in each department of his establishment, or establishments, where employees subject to the Act are working such notices as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor.

(Secs. 5, 6, 7, 8, 13, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 207, 208)

[39 FR 29353, Aug. 15, 1974]

PART 695—HOMEWORKERS IN INDUSTRIES IN THE VIRGIN ISLANDS

Sec.

695.1 Applicability.
695.2 Definitions.
695.3 Filing and notification requirements.
695.4 Delivery and collection of goods.
695.5 Payment for work.
695.6 Records to be kept.
695.7 Maintenance of records.
695.8 Minimum piece rates prescribed by the Administrator.
695.9 Piece rates adopted by employers.
695.10 Penalties.
695.11 Petition for amendment of regulations.

AUTHORITY: Secs. 6, 11, 52 Stat. 1062, 1066; 29 U.S.C. 206, 211.

SOURCE: 16 FR 7, Jan. 3, 1951, unless otherwise noted.

§ 695.1 Applicability.

The provisions of this part shall apply to persons engaged in activities relating to homeworkers in the Virgin Islands.

§ 695.2 Definitions.

(a) The meaning of the terms "person", "employer", "employee", "goods" and "production" as used in this part is the same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Homeworker", as used in this part, means any employee employed or suffered or permitted to perform homework for an employer.

(c) "Homework", as used in this part, means the production by any person in or about a home, apartment, tenement or room in a residential establishment, of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production: *Provided*, That such work is not performed under the constant and direct supervision of an employer or of a responsible supervisor and under such conditions that accurate records of hours worked are maintained or can readily be maintained.

(d) "Operation" means any work or any process other than the distribution of goods to or collection of goods from homeworkers.

[16 FR 11183, Nov. 2, 1951]

§ 695.3 Filing and notification requirements.

Every employer prior to the distribution of work to any homeworker (or prior to the commencement of work by a homeworker, in cases where the homeworker purchases the raw materials) shall file with the Territorial Office of the Wage and Hour Division in Puerto Rico:

(a) A design, pattern, diagram, photograph, or sample of the product, together with such other description or illustration of the product as he, upon inquiry at the Wage and Hour Division in Puerto Rico, may be requested to submit; and

(b) A description in writing of each operation to be performed by any homeworker, together with the full piece rate schedule designation, if any, prescribed in accordance with § 695.8, the corresponding piece rates to be paid for each such operation, and the style numbers, if any, of the goods upon which the operations are to be performed.

§ 695.4 Delivery and collection of goods.

Where goods for production in a home are distributed to the homeworker by the employer, such goods shall be personally distributed to and collected from the homeworker who is to work on the goods, either directly at the employer's principal office in the Virgin Islands or by employees expressly employed by the employer to distribute and collect such goods outside such principal office.

BEST DOCUMENT AVAILABLE

§ 695.5 Payment for work.

When an employer receives goods on which work has been completed, he shall pay the homeworker immediately for such work. Payment shall be made to each homeworker at rates not less than those required under § 695.8 or § 695.9, and in accordance with the requirements of sections 6 and 7 of the Act. In addition, any costs for materials incurred by the homeworker shall be reimbursed by the employer.

§ 695.6 Records to be kept.[1]

(a) Every employer shall make and have available at his principal office in the Virgin Islands a record of the following information:

(1) The name and address of each firm situated outside the Virgin Islands, if any, from whom the goods for delivery to a homeworker were received.

(2) The name and address of each homeworker, and the date of birth of each homeworker under 19, to whom goods were delivered or from whom goods were purchased.

(3) The dates upon which goods were delivered to and collected from, or purchased from, each homeworker.

(4) The style number, if any, description of, and amount of goods, the operations to be performed or performed thereon, together with the piece rates to be paid or paid, the gross amount actually paid each homeworker for the operations performed upon such goods, the amount, if any, paid by the homeworker for materials, and the net amount received by the homeworker.

(5) The date upon which each homeworker was paid for operations performed on the goods.

(b) At the time work is given out to or received or purchased from a homeworker, as the case may be, every employer shall enter the following information in the handbook (to be obtained by the employer from the Wage and Hour Division and supplied by him to each homeworker) which shall be kept by the homeworker:

(1) The dates upon which goods were delivered to and collected from, or purchased from, the homeworker.

(2) The style number, if any, description of, and amount of goods, the operations to be performed or performed thereon, together with the piece rates to be paid or paid the gross amount actually paid the homeworker for the operations performed upon such goods, the amount, if any, paid by the homeworker for materials, and the net amount received by the homeworker.

(3) The date upon which the homeworker was paid for operations performed on the goods.

(4) The signature of the person acting in behalf of the employer.

(c) No employer shall employ any homeworker for more than 40 hours in any workweek unless, in addition to the records which he is required to keep pursuant to paragraphs (a) and (b) of this section, such employer makes and keeps available at his principal office in the Virgin Islands, and enters in the handbook of each such homeworker, a record of the following information:

(1) The hours worked by the homeworker on the goods in each lot of work delivered to the employer.

(2) The total hours worked each week.

(3) The wages paid the homeworker each week at regular piece rates.

(4) The extra amount paid to the homeworker for hours worked in excess of 40 in each week.

(d) Every employer who makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to section 16(c) of the Act, shall:

(1) Record and preserve, as an entry on his payroll or other pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(2) Prepare a report of each such payment on the receipt form provided or authorized by the Wage and Hour Division, and (i) preserve a copy as part of his records, (ii) deliver a copy

---

[1] Although responsibility for making the record is placed upon the employer, the actual work of doing so may be performed by supervisory or clerical employees, or other persons acting in behalf of the employer. No particular order or form of records is prescribed by the regulations contained in this part. The employer may keep his own record system, so long as he keeps all the required information available in understandable form.

to the employee, and (iii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Administrator or his authorized representative within 10 days after payment is made.

[16 FR 7, Jan. 3, 1951, as amended at 20 FR 443, Jan. 20, 1955]

§ 695.7 Maintenance of records.

The employer shall collect each handbook as soon as it has been completed. Every employer shall keep and preserve for a period of not less than three years at his place of business all records required above, except the handbook which shall be kept for a period of two years subsequent to the date of the last entry therein. All such records shall be open at any time to inspection and transcription by the Administrator or his authorized representative.

§ 695.8 Minimum piece rates prescribed by the Administrator.

Pursuant to the provisions of section 6(a)(2) of the Act, each homeworker shall be paid, in lieu of the applicable hourly rate established by wage order, not less than the piece rates that may be provided by the Administrator.

[25 FR 636, Jan. 26, 1960]

§ 695.9 Piece rates adopted by employers.

Pursuant to the provisions of section 6(a)(2) of the Act, in the event that a homeworker is to perform an operation for which no minimum piece rate has been prescribed by regulation or order of the Administrator or his authorized representative, he shall be paid a piece rate adopted by the employer which shall yield to homeworkers of ordinary skill, under prevalent operating conditions and with equipment ordinarily found in homes, an amount not less than the applicable minimum hourly wage rate established by wage order. No employer shall adopt such a piece rate until he has first notified the Division of his intention to establish a rate for such operation, the rate fixed and the basis on which the piece rate has been computed. Such an employer piece rate shall be lawful only if it actually satisfies the requirements of this section, and such a rate shall remain in effect only until such time as the Administrator or his authorized representative, by regulation or order, establishes a minimum piece rate for such operation.

§ 695.10 Penalties.

Section 15 of the Act makes it unlawful for any person to violate the provisions of this part and subjects any such person to the penalties provided by section 16 and section 17 of the Act.

§ 695.11 Petition for amendment of regulations.

Any person wishing a revision of any of the terms of this part may submit in writing to the Administrator or his authorized representative a petition setting forth the changes desired, and the reasons for proposing them. If, upon inspection of the petition, the Administrator or his authorized representative believes that reasonable cause for amendment of this part is set forth, the Administrator or his authorized representative will either schedule a hearing with due notice to interested parties, or will make other provision for affording interested parties an opportunity to present their views, either in support of or in opposition to the proposed changes.

PART 697—INDUSTRIES IN AMERICAN SAMOA

Sec.
697.1 Wage rates and industry definitions.
697.2 Notices.
697.3 Effective date.

AUTHORITY: Secs. 5, 6, 8, 52 Stat., 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 697.1 Wage rates and industry definitions.

Every employer shall pay to each of his employees in American Samoa, who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in any enterprise engaged in commerce or in the production of goods for commerce, as these terms are defined in section 3 of the Fair Labor Standards Act of 1938, wages at a rate not less than the minimum rate or rates of wages prescribed in this section for the industries and classifications in which such employee is engaged.

(a) *Fish canning and processing and can manufacturing industry.* (1) The minimum wage for this industry is $2.55 an hour effective July 1, 1983.

(2) This industry shall include the canning, freezing, preserving, and other processing of any kind of fish, shellfish, and other aquatic forms of animal life, the manufacture of any byproduct thereof, and the manufacture of cans and related activities.

(b) *Shipping and transportation industry.* (1) The minimum wage for classification A, stevedore, lighterage and maritime shipping agency activity, is $2.53 an hour effective July 1, 1983. The minimum wage for classification B, all other activities, is $2.42 an hour effective July 1, 1983.

(2) This industry shall include the transportation of passengers and cargo by water or by air and all activities in connection therewith, including storage and lighterage operations: *Provided, however,* That this industry shall not include the operation of tourist bureaus and of travel and ticket agencies: *Provided, further;* That this industry shall not include bunkering of petroleum products or activities engaged in by seamen in American vessels which are documented or numbered under the Laws of the United States which operate exclusively between points in the Samoan Islands, and which are not in excess of 350 tons net capacity. Within this industry there shall be two classifications:

(i) Classification A: *Stevedoring, lighterage and maritime shipping agency activities.* This classification shall include all employees of employers who engage in each of the following three services: Stevedoring, lighterage and maritime shipping agency activities.

(ii) Classification B: *All other activities.* All other activities in the shipping and transportation industry.

(c) *Tour and travel service industry.* (1) The minimum wage for this industry is $1.98 an hour for a period of 1 year following the July 1, 1982, effective date specified in § 697.3 and $2.13 an hour thereafter.

(2) This industry shall include the operation of tourist bureaus and of travel and passenger ticket services and agencies: *Provided, however.* That this industry shall not include the operation of a freight shipping agency.

(d) *Petroleum marketing industry.* (1) The minimum wage for this industry is $2.53 an hour effective July 1, 1983.

(2) This industry shall include the wholesale marketing and distribution of gasoline, kerosene. lubricating oils, diesel and marine fuels, and other petroleum products, bunkering operations in connection therewith, and repair and maintenance of petroleum storage facilities.

(e) *Construction industry.* (1) The minimum wage for this industry is $2.00 an hour for a period of 1 year following the July 1, 1982, effective date specified in § 697.3 and $2.15 an hour thereafter.

(2) This industry shall include all construction, reconstruction, structural renovation and demolition, on public or private account, of buildings, housing, highways and streets, catchments, dams, and any other structure.

(f) *Hotel industry.* (1) The minimum wage for this industry is $1.60 an hour effective July 1, 1983.

(2) This industry shall include all activities in connection with the operation of hotels, motels, apartment hotels, and tourist courts engaged in providing lodging, with or without meals, for the general public, including such activities as are engaged in by a hotel or motel or other lodging facility on its own linens or on garments of its guests.

(g) *Retailing, wholesaling and warehousing industry.* (1) The minimum wage for this industry is $1.75 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $1.85 an hour thereafter.

(2) This industry includes all activities in connection with the selling of goods or services at retail, including the operation of retail stores and other retail establishments, the wholesaling and warehousing and other distribution of commodities including but without limitation the wholesaling,

warehousing and other distribution activities of jobbers, importers and exporters, manufacturers' sales branches and sales offices engaged in the distribution of products manufactured outside of American Samoa, industrial distributors, mail order establishments, brokers and agents, and public warehouses: *Provided, however,* That this industry shall not include retailing and wholesaling activities included within other industry wage orders which are applicable in American Samoa.

(h) *Laundry and dry cleaning industry.* (1) The minimum wage for this industry is $1.26 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $1.32 an hour thereafter.

(2) The Laundry and Dry Cleaning Industry is that industry which is engaged in laundering, cleaning, pressing or repairing clothing or fabrics, except such activities as are engaged in by a hotel or motel on its own linens or on articles of its guests.

(i) *Bottling and dairy products industry.* (1) The minimum wage for this industry is $1.69 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $1.84 an hour thereafter.

(2) The bottling and dairy products industry includes the bottling, sale and distribution of soft drinks in bottles and other containers and the processing or recombining of fluid milk and cream for wholesale and retail distribution and the manufacture of butter, natural and processed cheese, condensed and evaporated milk, malted milk, ice cream, and frozen desserts; including also any warehousing operations incidental to the above activities of firms engaged in these activities.

(j) *Printing and publishing industry.* (1) The minimum wage rate for this industry is $1.99 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $2.09 an hour thereafter.

(2) The printing and publishing industry is that industry which is engaged in printing, job printing, duplicating and publishing, other than the publishing of a weekly, semiweekly or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county where published or counties contiguous thereto.

(k) *Finance and insurance industry.* (1) The minimum wage rate for this industry is $2.18 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $2.31 an hour thereafter.

(2) The finance and insurance industry includes all banks and trust companies, credit agencies other than banks, holding companies, other investment companies, collection agencies, brokers and dealers in securities and commodity contracts, as well as carriers of all types of insurance, and insurance agents and brokers.

(l) *Private hospital and education institutions industry.* (1) The minimum wage rate for this industry is $1.60 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $1.66 an hour thereafter.

(2) This industry shall include all activities performed in connection with the operation of private hospitals, nursing homes and related institutions primarily engaged in the care of the sick, the aged or the mentally ill or defective who reside on the premises of such institutions, private schools for the mentally or physically handicapped or for gifted children, preschools, elementary or secondary schools, or institutions of higher education: *Provided, however,* That this industry shall not include employees of the Government of American Samoa or employees of any agency or corporation of the Government of American Samoa.

(m) *Government employees industry (nontraditional activities).* (1) The minimum wage rate for this industry is $1.79 an hour effective October 1, 1982.

(2) This industry is defined as the nontraditional governmental activities of an employee of the Government of American Samoa. The Administrator of the Wage and Hour Division of the U.S. Department of Labor has included within the definitions of nontraditional governmental activities of the Government of American Samoa all employees engaged in:

(i) Communication activity, including the installation, repair and maintenance of tele-communication equipment.

(ii) Electric utility operations including the production and distribution of electric energy and installation, repair and maintenance of such production and distribution facilities and equipment.

(iii) Operation, repair and maintenance of the Marine Railway, including structural ship and motor repairs and all other activities in connection therewith.

(iv) All activities in connection with the operation of the liquor store. *Provided, however,* That this industry shall not include any employee of the United States or its agencies.

(n) *Miscellaneous activities industry.* (1) The minimum wage rate for this industry is $1.59 an hour for a period of 1 year following the July 1, 1982 effective date specified in § 697.3 and $1.67 an hour thereafter.

(2) This industry shall include every activity not included in any other industry defined herein.

[41 FR 24121, June 15, 1976, as amended at 45 FR 40986, June 17, 1980; 47 FR 26826, June 22, 1982]

§ 697.2 Notices.

Every employer subject to the provisions of § 697.1 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 697.1 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor, and shall give such other notice as the Administrator may prescribe.

[41 FR 24121, June 15, 1976]

§ 697.3 Effective dates.

The wage rates specified in § 697.3 shall be effective as follows:

(a) Paragraphs (a), (b), (d), and (f) of § 697.1 are effective on July 1, 1983.

(b) Paragraph (m) of § 697.1 is effective on October 1, 1982.

(c) Paragraphs (c), (e), (g), (h), (i), (j), (k), (l), and (n) of § 697.1 are effective on July 1, 1982.

[47 FR 26827, June 22, 1982]

PART 699—TEXTILE AND TEXTILE PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
699.1 Definitions.
699.2 Wage rates.
699.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 41 FR 34744, Aug. 17, 1976, unless otherwise noted.

§ 699.1 Definitions.

The textile mill products industry in Puerto Rico is defined as follows: The preparation of textile fibers, including the ginning and compressing of cotton; the manufacture of batting, wadding, and filling: The manufacture, including dyeing and finishing of yarn, thread, cordage, twine, felt, woven and knitted fabrics, and lace-machine products from cotton, jute, sisal, coir, maguey, silk, rayon, nylon, wool or other vegetable, animal, or synthetic fiber, or from mixtures of these fibers; and the manufacture of blankets, textile bags, quilts, pillows, swabs, bandages, hairnets, oilcloth and artificial leather containing a textile or paper base, woven carpets and rugs, and hooked or punched rugs and carpeting: *Provided, however,* That the industry shall not include any product or activity included in the chemical petroleum, and related products industry; the furniture and fixtures and lumber and wood products industry; or in any apparel or needlework industry in Puerto Rico for which a separate wage order has been issued.

§ 699.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under subsection 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the textile and mill products industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classifications.* The classifications in this paragraph (a) apply to all activities of employees in the textile mill products industry in Puerto Rico to which section 6 of this Act applies without reference to the Fair Labor Standards Amendments of 1961.

(1) *Multiple-needle power-driven machine operations on hooked rugs classification.* (i) The minimum wage rate for this classification is $2.00 an hour through December 31, 1976; $2.15 an hour, effective January 1, 1977; and $2.30 an hour, effective May 1, 1977, by reason of section 6(c)(2).

(ii) This classification is defined as the punching or tufting in the manufacture of hooked or punched rugs and carpeting with multiple-needle machines containing five or more needles, including the operations of the machine, the work of the assistant or helper thereon, and the work of the maintenance employees who set up or repair these machines.

(2) *Other operations on hooked rugs classification.* (i) The minimum wage for this classification is $1.72 an hour through December 31, 1976; and $1.85 an hour effective January 1, 1977 through April 30, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as all operations and processes in the manufacture of hooked or punched rugs and carpeting except those included in the multiple-needle power-driven machine operations on hooked rugs classification as defined in paragraphs (a)(1) of this section.

(3) *Pillow classification.* (i) The minimum wage for this classification is $2.05 an hour through December 31, 1976; $2.15 an hour, effective January 1, 1977; and $2.30 an hour, effective May 1, 1977, by reason of section 6(c)(2).

(ii) This classification is defined as the manufacture of pillows.

(4) *Cotton swab and bandage classification*—(i) The minimum wage for this classification is $2.15 an hour, effective September 1, 1976, and $2.30 an hour, effective May 1, 1977, by reason of section 6(c) (2).

(ii) This classification is defined as the manufacture of cotton swabs and elastic and cotton bandages.

(5) *Other products and activities.* (i) The minimum wage for this classification is $1.90 an hour through December 31, 1976; and $1.95 an hour, effective January 1, 1977 through April 30, 1977. Under section 6(c) the rate will be $2.10 an hour on May 1, 1977; $2.15 an hour, effective January 1, 1978; and $2.30 an hour, effective May 1, 1978, by reason of section 6(c)(2).

(ii) This classification is defined as the manufacture of all products and all activities that are not specifically included in any other pre-1961 coverage classification of the industry.

(b) *1961 coverage classification.* (1) The minimum wage for this classification is $2.05 an hour through December 31, 1976; $2.15 an hour, effective January 1, 1977; and $2.30 an hour effective May 1, 1977, by reason of section 6(c)(2).

(2) This classification is defined as all activities of employees in the textile mill products industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1961.

(c) *1966 coverage classification.* (1) The minimum wage for this classification is $2.05 an hour through December 31, 1976; $2.15 an hour, effective January 1, 1977; and $2.30 an hour, effective May 1, 1977, by reason of section 6(c)(2).

(2) This classification is defined as all activities of employees in the textile mill products industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

§ 699.3 Notices.

Every employer subject to the provisions of § 699.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 699.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe. (Secs. 5, 6, 52 Stat. 1062 and 1064, as amended; 29 U.S.C. 205, 206, 208)

PART 700—GOVERNMENT WORKERS INDUSTRY IN PUERTO RICO

Sec.
700.1 Definition of the industry.
700.2 Wage rates.
700.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 39 FR 28877, Aug. 12, 1974, unless otherwise noted.

§ 700.1 Definition of the industry.

The Government Workers Industry in Puerto Rico is defined as follows: The employment of employees of the government of the Commonwealth of Puerto Rico, employees of the governments of the municipalities in Puerto Rico, and employees of any agency or corporation of the governments of the Commonwealth of Puerto Rico or any municipality in Puerto Rico: *Provided*, That the term shall not include any employee of the United States or its agencies: *Provided further*, That the term shall not include any employee covered by the wage order for the Education Industry in Puerto Rico (29 CFR Part 725), for the Hospital and Related Institutions Industry in Puerto Rico (29 CFR Part 724), and for the Communications, Utilities and Transportation industry (29 CFR Part 671): *Provided, however*, That the industry shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1974.

§ 700.2 Wage rates.

(a) *Commonwealth government employees*. (1) The minimum rate for this classification is $2.20 an hour through December 31, 1976 and $2.30 an hour thereafter.

(2) This classification is defined as all activities of employees of the government of the Commonwealth of Puerto Rico, including those of any of its agencies or corporations, except for those employees engaged in the agricultural and manufacturing phases of the Puerto Rico Land Authority and the Sugar Corporation of Puerto Rico.

(b) *Municipal government employees*. (1) The minimum wage for this classification is $1.50 an hour through October 31, 1976; $1.90 an hour, effective November 1, 1976; and $2.00 an hour, effective July 1, 1977.

(2) This classification is defined as all activities of employees of the governments of the municipalities of Puerto Rico, including those of any of its agencies or corporations.

(c) *Right to Employment Administration employees*. (1) The minimum wage for this classification is $1.75 an hour through October 31, 1976; $1.85 an hour, effective November 1, 1976; and $1.95 an hour, effective July 1, 1977.

(2) This classification is defined as all activities of employees in programs where the Right to Employment Administration acts solely as employer.

(d) *Puerto Rico Land Authority and Sugar Corporation of Puerto Rico employees*. This classification is limited to employees of the Puerto Rico Land Authority and Sugar Corporation of Puerto Rico.

(1) *Agricultural phase*. This phase is defined as to include employees of the Puerto Rico Land Authority and Sugar Corporation of Puerto Rico employees engaged in farming in all its branches, including but not limited to the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur bearing animals, or poultry, and any practice performed on a farm as an incident to, or in conjunction with such farming operations.

(i) *Sugarcane farms*. Sugarcane farms include the preparation of the soil, the planting and cultivating of sugarcane (all work related to the growing and maturing of the crop), the harvesting of sugarcane and any other work related to the production and delivery of sugarcane on a sugarcane farm.

(A) *Craftsman classification*. (*1*) The minimum wage for this classification is $1.75 an hour through October 31, 1976; $2.00 an hour, effective November 1, 1976; and $2.20 an hour, effective July 1, 1977.

(*2*) This classification is defined as all activities on sugarcane farms performed by craftsmen who practice, carry out or accomplish work which requires mechanical or manual skill.

(B) *Other employees classification.* (*1*) The minimum wage for this classification is $1.65 an hour through October 31, 1976, $1.83 an hour, effective November 1, 1976; and $1.98 an hour, effective July 1, 1977.

(*2*) This classification is defined as all activities on sugarcane farms except those included in the craftsmen classification of this industry.

(ii) *Pineapple farms.* (A) The minimum wage for this classification is $1.65 an hour through October 31, 1976; $1.80 an hour, effective November 1, 1976; and $1.95 an hour, effective July 1, 1977.

(B) This classification is defined as all activities on pineapple farms, including those engaged in the sowing, cultivation, harvesting, sale and delivery of pineapple to a warehouse or market.

(iii) *Cattle farms.* (A) The minimum wage for this classification is $1.55 an hour through October 31, 1976; $1.75 an hour, effective November 1, 1976; and $1.90 an hour, effective July 1, 1977.

(B) This classification is defined as all activities on cattle farms, including those engaged in the breeding and raising of cattle for meat.

(iv) *Other farms.* (A) The minimum wage for this classification is $1.45 an hour through October 31, 1976; $1.60 an hour, effective November 1, 1976; and $1.75 an hour, effective July 1, 1977.

(B) This classification includes all activities on farms not included in other subdivisions of this paragraph.

(2) *Industrial phase.* This phase is defined to include all employees of the Puerto Rico Land Authority and Sugar Corporation of Puerto Rico employees other than those engaged in farming.

(i) *Sugar manufacturing.* (A) The minimum wage for this classification is $1.93 an hour through October 31, 1976; $2.10 an hour, effective November 1, 1976; and $2.20 an hour, effective July 1, 1977.

(B) This classification is defined as all activities in the production of raw sugarcane juice, molasses and refined sugar, and incidental byproducts; all railroad transportation activities where such activities are in whole or in part for the production or shipment of the products of this classification; and any transportation activities by truck, vessel, or other vehicle in connection with the production or shipment of such products.

(ii) *Other activities classification.* (A) The minimum wage for this classification is $2.00 an hour through October 31, 1976; $2.10 an hour, effective November 1, 1976; and $2.20 an hour, effective July 1, 1977.

(B) This classification is defined as all activities in the industrial phase except those included in the sugar manufacturing classification.

[39 FR 28877, Aug. 12, 1974, as amended at 41 FR 44695, Oct. 12, 1976]

§ 700.3 Notices.

Every employer subject to the provisions of § 700.2 shall post in a conspicuous place in each department of its establishment where employees subject to the provisions of § 700.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 701—NEWLY COVERED EMPLOYMENT IN PUERTO RICO OTHER THAN GOVERNMENT SERVICE

Sec.
701.1 Definition.
701.2 Wage rates.
701.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064 (29 U.S.C. 205, 206, 208).

SOURCE: 39 FR 32027, Sept. 4, 1974, unless otherwise noted.

§ 701.1 Definition.

The 1974 coverage classifications include all activities other than government service to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1974.

§ 701.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each employee who in any workweek is engaged in an activity brought within the purview of section 6 of the Act by the Fair Labor Standards Amendments of 1974. Future rates shown herein include increases of $0.15 an hour on the 1st day of May, of each year until the mainland rate is reached (as required by section 6(c)(2) of the Act) and the increases for January 1, 1977 and January 1, 1978 (as required by sections 6(a)(5) and 6(b).

(a) *Domestic service workers.* (1) The minimum wage for this classification is $2.20 an hour through December 31, 1976 and $2.20 an hour thereafter.

(2) This classification is defined to include all services of a household nature performed by an employee in or about the private home of the person by whom he or she is employed. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling maintained by an individual or family in an apartment house or motel may constitute a private home. However, a dwelling house primarily used as a boarding or lodging house for the purpose of supplying such services to the public as a business enterprise is not a private home.

(3) Domestic service in and about a private home includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms and chauffeurs.

(b) *Small retail and service establishments.* (1) The minimum wage for this classification is $2.20 an hour through December 31, 1976 and $2.30 an hour thereafter.

(2) This classification is defined to include employees employed in retail and service establishments that are parts of covered enterprises and that have an annual dollar volume of sales which is not less than $225,000 after January 1, 1975, and is not less than $200,000 after January 1, 1976, and in any amount after January 1, 1977.

(c) *Small telegraph agencies.* (1) The minimum wage for this classification is $2.20 an hour through December 31, 1976; $2.30 an hour thereafter.

(2) This classification is defined to include employees engaged in handling telegraphic messages for the public where the revenue does not exceed $500 a month.

(d) *Motion picture theaters.* This activity comprises every theater where motion pictures are exhibited. (Drive-in theaters are included in this class.)

(1) *Motion picture projectionists and managers.* (i) The minimum wage for this classification is $2.20 an hour through December 31, 1976 and $2.30 an hour thereafter.

(2) *Electricians, plumbers, drivers, painters, and other arts and crafts employees.* (i) The minimum wage for this classification is $2.20 an hour through December 31, 1976 and $2.30 an hour thereafter.

(3) *All other employees.* (i) The minimum wage for this classification is $2.20 an hour through December 31, 1976 and $2.30 an hour thereafter.

(e) *Processing of shade-grown tobacco.* (1) The minimum wage for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour effective January 1, 1977; through December 31, 1977; and $2.30 an hour thereafter.

(2) This classification includes all agricultural employees engaged in processing shade-grown tobacco prior to stemming.

(f) *Small logging operations.* (1) The minimum wage for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour January 1, 1977 through December 31, 1977; and $2.30 an hour thereafter.

(2) This classification includes employees in forestry or lumbering operations where the number of employees is eight or less.

(g) *Agricultural employees of large conglomerates.* (1) The minimum wage for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour January 1, 1977 through December 31, 1977 and $2.30 an hour thereafter.

(2) This classification includes agricultural employees of conglomerates with an annual gross volume of sales exceeding $10,000,000 regardless of the number of employees engaged in agriculture.

[39 FR 32027, Sept. 4, 1974, as amended at 41 FR 43403, Oct. 1, 1976]

§ 701.3 Notices.

Every employer subject to the provisions of § 701.2 shall post in a conspicuous place in each department of its establishment where employees subject to the provisions of § 701.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 720—RUBBER AND MISCELLANEOUS PLASTICS PRODUCTS INDUSTRY IN PUERTO RICO

Sec.
720.1 Definition.
720.2 Wage rates.
720.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 720.1 Definition.

The rubber and miscellaneous plastics products industry in Puerto Rico is defined as the manufacture from natural, synthetic, or reclaimed rubber or latex rubber products such as, but not limited to, tires and tubes, reclaimed rubber, rubber and plastics hose and belting, industrial and mechanical rubber and plastics goods, rubberized fabrics, recapped and retreaded tires, rubber and plastics cut stock and findings for footwear, and miscellaneous rubber and fabricated plastics products: *Provided, however,* That the industry shall not include any activity in the rubber and plastics footwear industry; the chemical, petroleum and related products industry; the leather, leather goods and related products industry; the gloves and mittens industry; the men's and boys' clothing and related products industry; the corsets, brassieres and allied garments industry; the women's outerwear, needlework and miscellaneous fabricated textile products industry; the textile mill products industry; and the jewelry and miscellaneous products manufacturing industry.

[42 FR 3304, Jan. 18, 1977]

§ 720.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications for pre-1966 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Rubber products classification.* (i) The minimum rate for this classification is $2.30 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(a)(1) now apply, namely, $2.10 an hour during the year ending December 31, 1975, and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of all rubber products including the recapping and retreading of tires and tubes by a vulcanizing process.

(2) *Plastic dinnerware, sprayer, vaporizer, phonograph record and artificial flower classification.* (i) The minimum wage for this classification is $2.20 an hour through April 30, 1977, and $2.30 an hour effective May 1, 1977. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as the manufacture of plastic dinnerware, sprayers, vaporizers, atomizers, phonograph records and artificial flowers of molded plastic.

(3) *Plastic pipe and fittings classification:* (i) The minimum wage for this classification is $2.15 an hour through April 30, 1977, and $2.30 an hour effective May 1, 1977. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as the manufacture or assembly of plastic pipes and plastic pipe fittings.

(4) *Other plastics products classification.* (i) The minimum wage for this classification is $2.15 an hour through April 30, 1977, and $2.30 an hour effective May 1, 1977. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as the manufacture of all plastics products not included in other pre-1966 coverage classifications in the industry.

(b) *1966 coverage classifications.* These classifications for 1966 coverage apply to all activities in the industry to which section 6 of the Fair Labor Standards Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

(1) *Rubber products classification.* (i) The minimum rate for this classification is $2.30 an hour for the period ending December 31, 1974. Since the mainland rate has been attained, the rates specified in section 6(b) now apply, namely $2.00 an hour during the year ending December 31, 1975; $2.20 an hour during the year ending December 31, 1976; and $2.30 an hour thereafter (section 6(c)(5)).

(ii) This classification is defined as the manufacture of all rubber products including the recapping and retreading of tires and tubes by a vulcanizing process.

(2) *Plastics products classification.* (i) The minimum wage for this classification is $2.20 an hour through April 30, 1977, and $2.30 an hour effective May 1, 1977. Unless otherwise provided, the wage rates in this section are increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(ii) This classification is defined as the manufacture of all plastic products.

[30 FR 2536, Feb. 26, 1965, as amended at 39 FR 43544, Dec. 16, 1974; 42 FR 3304, Jan. 18. 1977]

§ 720.3 Notices.

Every employer subject to the provisions of § 720.3 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 720.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[39 FR 13271, Apr. 12, 1974]

PART 721—RETAIL TRADE INDUSTRY IN PUERTO RICO

Sec.
721.1 Definition.
721.2 Wage rates.
721.3 Notices.

AUTHORITY: Sec. 8, 52 Stat. 1064, as amended; 29 U.S.C. 208. Interpret or apply secs. 5, 6, 52 Stat. 1062, as amended; 29 U.S.C. 205, 206, 208.

§ 721.1 Definition.

The Retail Trade Industry in Puerto Rico is defined as follows: The selling of goods at retail, and incidental activities (including servicing, installation, delivery and repair) performed by employees of a retail or service establishment as defined in section 13(a)(2) of the Fair Labor Standards Act: *Provided, however,* That the industry shall not include the activities of employees who are engaged in the following industries or occupations: (a) wholesaling, warehousing and other distribution of products manufactured by their employer in Puerto Rico; (b) activities covered by the wage order for the wholesaling and warehousing industry (which applies, among other activities, to retail distribution centers and central office functions of retail enterprises);[1] (c) food service employees of retail or service establishments; (d) retail or service employees brought within scope of the Act's coverage by the 1974 amendments;[2] (e) activities covered by the wage order for the communications, utilities and transportation industry; (f) the hotel and motel industry; (g) the restaurant and food service industry; or (h) activities covered by the wage order for the business, and professional and miscellaneous services industry.

[41 FR 38504, Sept. 10, 1976]

§ 721.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in each of the classifications in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or the production of goods for commerce as those terms are defined in section 3 of the Act.

(a) *Pre-1966 coverage classifications.* The classifications for pre-1966 coverage apply to all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1966.

(1) *Gasoline service stations classification.* (i) The minimum wage for this classification is $2.05 an hour for the period ending April 30, 1977. Under section 6(c) the rate will be increased by $0.15 an hour on May 1, 1977 and on May 1 of each subsequent year until the mainland rate is reached (section 6(c)(2)).

(ii) This classification is defined as the operation of any gasoline service establishment engaged primarily in the selling of gasoline and lubricating oil.

(2) *Other activities classification.* (i) The minimum for this classification is $2.30 an hour (section 6(c)(5)).

(ii) This classification is defined as all activities in the Retail Trade Industry except those within the gasoline service stations classification.

(b) *1966 coverage classification.* (1) The minimum wage for this classification is $2.20 an hour for the period ending December 31, 1976. Since the mainland rate has been attained, the rate specified in section 6(b) now applies, namely $2.30 an hour effective January 1, 1977 (section 6(c)(5)).

(2) This classification is defined as all activities in the retail trade industry in Puerto Rico, to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

[36 FR 429, Jan. 13, 1971, as amended at 41 FR 38504, Sept. 10, 1976]

§ 721.3 Notices.

Every employer subject to the provisions of § 721.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 721.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[36 FR 429, Jan. 13, 1971]

---

[1] (This) Refers to activities covered by Part 683 for which the minimum rate is $2.30 an hour, effective January 1, 1976, in accordance with section 6(c)(5) of the Act.

[2] (This) Refers to employees covered by § 701.2(b) i.e. those employed in small retail and service establishments that are parts of covered enterprises and that have an annual dollar volume of sales which is not less than $200,000 through December 31, 1976, and in any amount after January 1, 1977. For such employees the minimum rate is $2.20 an hour for the period ending December 31, 1976 (in accordance with section 6(b) and $2.30, effective January 1, 1977, (section 6(c)(5)).

PART 723—LAUNDRY AND CLEANING INDUSTRY IN PUERTO RICO

Sec.
723.1 Definition.
723.2 Wage rates.
723.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 32 FR 4409, Mar. 23, 1967, unless otherwise noted.

§ 723.1 Definition.

The laundry and cleaning industry in Puerto Rico, to which this part shall apply, is defined as follows: Laundering, dry cleaning, and incidental work such as repair of clothing and fabrics on which such work is done and the work done in family and commercial power laundries, linen supply and industrial launderers, diaper services, self-service laundries, hand laundries, cleaning and dyeing plants, and rug cleaning and repairing plants: *Provided, however,* That the industry shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1966.

§ 723.2 Wage rates.

(a) Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(b) The minimum wage for this industry is $1.90 an hour for the period ending April 30, 1976. Under section 6(c)(2) the rate will be increased by $0.15 an hour to $2.05 on May 1, 1976. The committee directs a further 10 cents increase to take effect on January 1, 1977, raising the rate to $2.15 an hour. Subsequently, the rate will, by reason of section 6(c)(2), be increased to $2.30 an hour on May 1, 1977.

[41 FR 16956, Apr. 23, 1976]

§ 723.3 Notices.

Every employer subject to the provisions of § 723.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 723.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 724—HOSPITAL AND RELATED INSTITUTIONS INDUSTRY IN PUERTO RICO

Sec.
724.1 Definition.
724.2 Wage rates.
724.2a Wage rates effective for the period ending January 31, 1969.
724.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 724.1 Definition.

The hospital and related institutions industry in Puerto Rico, to which this part shall apply, is defined as follows: The performance of activities in connection with the operation of hospitals, nursing homes, sanitariums, rest homes, convalescent homes, and related institutions primarily engaged in the care of persons who are sick, aged, or the mentally ill or defective who reside on the premises of such institutions, regardless of whether or not such a hospital or institution is public or private or operated for profit or not for profit: *Provided, however,* That the industry shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1966.

[32 FR 5268, Mar. 29, 1967]

§ 724.2 Wage rates.

(a) Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(b) The minimum wage for this industry is $1.90 an hour for the period ending April 30, 1976. Under section 6(c)(2) the rate will be increased by $0.15 an hour to $2.05 on May 1, 1976. The committee directs a further 10 cents increase to take effect on January 1, 1977, raising the rate to $2.15 an hour. Subsequently, the rate will, by reason of section 6(c)(2), be increased to $2.30 an hour on May 1, 1977.

[41 FR 16957, Apr. 23, 1976]

§ 724.2a Wage rates effective for the period ending January 31, 1969.

(a) *Application.* Wages at rates not less than those prescribed in paragraphs (b), (c), and (d) of this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 for the period ending January 31, 1969, by every employer to each of his employees in the hospital and related institutions industry in Puerto Rico who in any workweek is engaged in an activity brought within the purview of section 6 of the Act by the Fair Labor Standards Amendments of 1966.

(b) *Classification A.* (1) The minimum wage for Classification A is $1.15 per hour for the period ending January 31, 1969.

(2) Classification A is defined as all activities in the hospital and related institutions industry in Puerto Rico which are performed by medical technologists, laboratory technicians, registered nurses, X-ray technicians, laboratory assistants, skilled arts and crafts employees, and drivers.

(c) *Classification B.* (1) The minimum wage for Classification B is $1 per hour for the period ending January 31, 1969.

(2) Classification B is defined as all activities in the hospital and related institutions industry in Puerto Rico which are performed by office clerks, cooks, and semiskilled arts and crafts employees.

(d) *Classification C.* (1) The minimum wage for this classification is $.90 per hour for the period ending January 31, 1969.

(2) Classification C is defined as all activities in the hospital and related institutions industry in Puerto Rico except those within classification A and classification B.

[33 FR 18931, Dec. 19, 1968]

§ 724.3 Notices.

Every employer subject to the provisions of § 724.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 724.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[32 FR 5268, Mar. 29, 1967]

PART 725—EDUCATION INDUSTRY IN PUERTO RICO

Sec.
725.1 Definition.
725.2 Wage rates.
725.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 725.1 Definition.

The education industry in Puerto Rico, to which this part shall apply, is defined as follows: The operation of preschools, elementary, or secondary schools or institutions of higher education, or schools for mentally or physically handicapped or gifted persons, regardless of whether public or private or operated for profit or not for profit: *Provided, however,* That the industry shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1966.

[37 FR 16494, Aug. 15, 1972]

§ 725.2 Wage rates.

(a) Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the industry who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act.

(b) The minimum wage for this industry is $1.90 an hour for the period ending April 30, 1976. Under section 6(c)(2) the rate will be increased by $0.15 an hour to $2.05 on May 1, 1976. The committee directs a further 15 cents increase to take effect on January 1, 1977, raising the rate to $2.20 an hour. Subsequently, the rate will, by operation of section 6(c)(2), be increased to $2.30 an hour on May 1, 1977.

[41 FR 16957, Apr. 23, 1976]

§ 725.3 Notices.

Every employer subject to the provisions of § 725.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 725.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[32 FR 5269, Mar. 29, 1967]

PART 726—CONSTRUCTION INDUSTRY IN PUERTO RICO

Sec.
726.1 Definition.
726.2 Wage rates.
726.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 20 U.S.C. 205, 206, 208.

Source: 36 FR 428, Jan. 13, 1971, unless otherwise noted.

§ 726.1 Definition.

The construction industry in Puerto Rico, to which this part shall apply, is defined as follows: The design, construction, reconstruction, alteration, repair and maintenance of buildings, structures, and other improvements on land; the assembling at the construction site and the installation of machinery and other facilities in or upon such improvements; and the dismantling, wrecking, or other demolition of such improvements: *Provided, however,* That the construction industry shall not include any activity carried on by an establishment in Puerto Rico for its own use to which another wage order for the primary business of such establishment would otherwise be applicable.

§ 726.2 Wage rates.

Wages at the rate of not less than $1.80 an hour shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce as those terms are defined in section 3 of the Act. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1975, and on May 1 of each subsequent year until the mainland rate if reached pursuant to section 6(c)(2) of the Act.

[40 FR 16063, Apr. 9, 1975]

§ 726.3 Notices.

Every employer subject to the provisions of § 726.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 726.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 727—AGRICULTURE INDUSTRY IN PUERTO RICO

Sec.
727.1 Definition.
727.2 Wage rates.
727.3 Notices.

Authority: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

§ 727.1 Definition.

The Agriculture Industry in Puerto Rico is defined as follows: Farming in all its branches, including the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur bearing animals, or poultry, and any other practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including the preparation for market, delivery to storage or to market or to the carriers for transportation to market: *Provided, however,* That the agriculture industry shall not include any activities included in the food and kindred products industry in Puerto Rico, the tobacco manufacturers industry in Puerto Rico, and the communications, utilities, and transportation industry in Puerto Rico: *and provided further,* That the industry shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1966, or the activities of employees to whom the minimum wage section of the Act is made applicable by the Fair Labor Standards Amendments of 1974.

[39 FR 31316, Aug. 28, 1974]

§ 727.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees who in any workweek is engaged in an activity in any of the following classifications of the agriculture industry in Puerto Rico, which was brought within the purview of section 6 of the Act by the Fair Labor Standards Amendments of 1966.

(a) *Drivers, tractor operators and machinery operators on farms other than sugarcane farms classification.* (1) The minimum rate for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour, effective January 1, 1977; and $2.30 an hour, effective January 1, 1978; by reason of section 6(a)(5).

(2) This classification is defined as all activities on farms, other than sugarcane farms, performed by drivers of motor vehicles, tractor operators, or operators of any other agricultural motor machinery. Tractor operators include those who condition and operate tractors to haul heavy agricultural machinery such as plows, cultivators, rakes, etc., and may operate a small tractor (wheeled tractor) commonly known in Puerto Rico as MOSQUITO to haul light agricultural machinery used on farms or to pull dump wagons, mow grass, sink poles, etc.

(b) *Milkers classification.* (1) The minimum rate for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour effective January 1, 1977; and $2.30 an hour effective January 1, 1978; by reason of section 6(a)(5).

(2) This classification is defined as the activities of milkers in dairy farms who milk cows by machine or by hand, and tend machines which separate milk from cream.

(c) *Craftsmen on farms other than sugarcane farms classification.* (1) The minimum rate for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour effective January 1, 1977; and $2.30 an hour effective January 1, 1978; by reason of section 6(a)(5).

(2) This classification is defined as all activities on farms, other than sugarcane farms, performed by craftsmen who practice, carry out or accomplish any work which requires mechanical or manual skill, including but without limitation, cabinetmakers, electricians, painters, mechanics, masons, carpenters, or plumbers.

(d) *Other workers on livestock and dairy farms classification.* (1) The minimum rate for this classification is $1.70 an hour through October 31, 1976, and $1.75 an hour, effective November 1, 1976. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as all activities on livestock and dairy farms, except those included in the drivers, etc. classification, or the milkers classification, or the craftsmen classification.

(e) *Other workers on tobacco and coffee farms classification.* (1) The minimum rate for this classification is

$1.55 an hour through April 30, 1977. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as all activities on tobacco and coffee farms, except those included in the drivers etc. classification or the craftsmen classification.

(f) *Other workers on ornamental plant farms classification.* (1) The minimum rate for this classification is $1.80 an hour through April 30, 1977; $1.95 effective May 1, 1977, pursuant to section 6(c)(2) of the Act; and $2.10 effective January 1, 1978. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1978 and by $.15 an hour on May 1, 1979 pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as all activities on ornamental plant farms; including the sowing, cultivation and production of flowers and plants, trees, and grass used for ornamental purposes; except those activities included in the drivers, etc. classification or the craftsmen classification.

(g) *Other workers on pineapple farms classification.* (1) The minimum rate for this classification is $1.80 an hour through April 30, 1977. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1977, and on may 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as all activities on pineapple farms, except those included in the drivers, etc., classification or the craftsmen classification.

(h) *Other workers on other farms (except sugarcane farms) classification.* (1) The minimum rate for this classification is $1.55 an hour through October 31, 1976 and $1.60 an hour effective November 1, 1976. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1977, and on May 1 of each subsequent year until the mainland rate is reached pursuant to section 6(c)(2) of the Act.

(2) This classification is defined as all activities on other farms (except sugarcane farms) except those included in the drivers, etc., classification or the craftsmen classification.

(i) *Principal operators of mechanical loaders, harvesters, and sowers on sugarcane farms classification.* (1) The minimum rate for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour, effective January 1, 1977; and $2.30 an hour, effective January 1, 1978; by reason of section 6(a)(5).

(2) This classification is defined as all activities on sugarcane farms performed by principal operators of mechanical loaders, harvesters, and sowers.

(j) *Operators of mechanical equipment and craftsmen (except operators of mechanical loaders, harvesters, and sowers) on sugarcane farms classification.* (1) The minimum rate for this classification is $2.00 an hour through December 31, 1976; $2.20 an hour, effective January 1, 1977; and $2.30 an hour, effective January 1, 1978; by reason of section 6(a)(5).

(2) This classification is defined as all activities on sugarcane farms performed by all operators of mechanical equipment such as tractors, tractor plows, fertilizing machines, herbicide spraying machines, and trucks including also heavy mechanical equipment; and the activities performed by craftsmen.

(k) *Other workers on sugarcane farms classification.* (1) The minimum rate for this classification is $1.83 an hour through April 30, 1977. Unless otherwise provided, this wage rate is increased by $.15 an hour on May 1, 1977; and on May 1 of each subsequent year until the mainland rate is reached.

(2) This classification is defined as all activities on sugarcane farms except those included in the two other sugarcane classifications.

[41 FR 43403, Oct. 1, 1976]

§ 727.3 Notices.

Every employer subject to the provisions of § 727.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 727.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

[37 FR 14876, July 26, 1972, as amended at 40 FR 28064, July 3, 1975]

PART 728—HOTEL AND MOTEL INDUSTRY IN PUERTO RICO

Sec.
728.1 Definition.
728.2 Wage rates.
728.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 32 FR 6092, Apr. 18, 1967, unless otherwise noted.

§ 728.1 Definition.

The hotel and motel industry in Puerto Rico, to which this part shall apply, is defined as follows: The operation of hotels, motels, apartment hotels which provide accommodations for transients, and tourist courts, engaged in providing lodging, with or without meals, for the general public including all activities incidental to any of the foregoing: *Provided, however*, That the hotel and motel industry in Puerto Rico shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1966.

§ 728.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees who in any workweek is engaged in an activity in the hotel and motel industry in Puerto Rico, which was brought within the purview of section 6 of the Act by the Fair Labor Standards Amendments of 1966.

(a) *Hotels, motels, apartment hotels, and tourist courts with 100 or more sleeping rooms classification.* (1) The minimum wage for this classification is $1.60 an hour.

(2) This classification is defined as all activities in the hotel and motel industry in Puerto Rico in the operation of hotels, motels, apartment hotels, and tourist courts with 100 or more sleeping rooms.

(b) *Arts and crafts workers in hotels, motels, apartment hotels, and tourist courts with fewer than 100 sleeping rooms classification.* (1) The minimum wage for this classification is $1.60 an hour.

(2) This classification is defined as all activities in the hotel and motel industry in Puerto Rico, performed in the operation of hotels, motels, apartment hotels, and tourist courts with fewer than 100 sleeping rooms, by employees in the arts and crafts requiring mechanical or manual skills, such as, but not limited to, cabinetmakers, electricians, painters, upholsterers, designers, mechanics, masons, carpenters, or plumbers.

(c) *Other workers in hotels, motels, apartment hotels, and tourist courts with fewer than 100 sleeping rooms classification.* (1) The minimum wage for this classification is $1.55 an hour.

(2) This classification is defined as all activities in the hotel and motel industry in Puerto Rico other than those activities included in any other classification of this industry.

[32 FR 6092, Apr. 18, 1967, as amended at 36 FR 1058, Jan. 22, 1971]

§ 728.3 Notices.

Every employer subject to the provisions of § 728.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 728.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

PART 729—RESTAURANT AND FOOD SERVICE INDUSTRY IN PUERTO RICO

Sec.
729.1 Definition.
729.2 Wage rates.
729.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

SOURCE: 32 FR 6093, Apr. 18, 1967, unless otherwise noted.

§ 729.1 Definition.

The restaurant and food service industry in Puerto Rico, to which this part shall apply, is defined as follows: The operation of restaurants and other food service establishments engaged in the preparation or offering of food or beverages for human consumption either on the premises, or by such other services as catering, banquet, box lunch, or curb or counter service, to the public, to employees (or to members or guests of members of clubs): *Provided, however,* That the restaurant and food service industry in Puerto Rico shall not include food service in retail establishments: *Provided further,* That the industry shall not include any activity to which the Fair Labor Standards Act of 1938 would have applied prior to the Fair Labor Standards Amendments of 1966.

§ 729.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees who in any workweek is engaged in an activity in the restaurant and food service industry in Puerto Rico, which was brought within the purview of section 6 of the Act by the Fair Labor Standards Amendments of 1966.

(a) *Tipped employee classification.* (1) The minimum wage for this classification is $1.60 an hour.

(2) This classification is defined as all activities in the restaurant and food service industry in Puerto Rico, performed by any employee in any occupation in which he customarily and regularly receives more than $20 a month in tips.

(b) *Other employees classification.* (1) The minimum wage for this classification is $1.50 an hour.

(2) This classification is defined as all activities in the restaurant and food service industry in Puerto Rico other than those activities included in the tipped employee classification of this industry.

[32 FR 6093, Apr. 18, 1967, as amended at 36 FR 1059, Jan. 22, 1971]

§ 729.3 Notices.

Every employer subject to the provisions of § 729.2 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 729.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor and shall give such other notices as the Administrator may prescribe.

PART 730—RUBBER AND PLASTICS FOOTWEAR INDUSTRY IN PUERTO RICO

Sec.
730.1 Definition.
730.2 Wage rates.
730.3 Notices.

AUTHORITY: Secs. 5, 6, 8, 52 Stat. 1062, 1064, as amended; 29 U.S.C. 205, 206, 208.

SOURCE: 39 FR 13271, Apr. 12, 1974, unless otherwise noted.

§ 730.1 Definition.

The Rubber and Plastics Footwear Industry in Puerto Rico is defined as the manufacture of footwear made by vulcanizing soles to fabric uppers, footwear made by molding plastic soles to fabric uppers, rubber and plastics protective footwear, plastics footwear molded to shape, and rubber and plastics sandals and slippers: *Provided, however,* That the industry shall not include any activity included in the nonrubber footwear industry or the rubber and miscellaneous plastics products industry.

§ 730.2 Wage rates.

Wages at rates not less than those prescribed in this section shall be paid under section 6(c) of the Fair Labor Standards Act of 1938 by every employer to each of his employees in the rubber and plastics footwear industry in Puerto Rico who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, as these terms are defined in section 3 of the Act.

(a) *Pre-1961 coverage classification.* (1) The minimum wage for this classification is $1.45 an hour.

(2) This classification is defined as all activities in the industry to which section 6 of the Act would have applied prior to the Fair Labor Standards Amendments of 1961.

(b) *1961 coverage classifications.* The classifications for 1961 coverage apply to all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1961.

(1) *Rubber footwear classification.* (i) The minimum wage for this classification is $1.45 an hour.

(ii) This classification is defined as the manufacture or partial manufacture of footwear made by vulcanizing the entire article or made by vulcanizing soles to fabric uppers.

(2) *Other products and activities classification.* (i) The minimum wage for this classification is $1.45 an hour.

(ii) This classification is defined as the manufacture of all products and all activities that are not specifically included in the other 1961 coverage classification of the industry.

(c) *1966 coverage classification.* (i) The minimum wage is $1.60 an hour.

(ii) This classification is defined as all activities in the industry to which section 6 of the Act applies solely by reason of the Fair Labor Standards Amendments of 1966.

§ 730.3 Notices.

Every employer subject to the provisions of § 730.3 shall post in a conspicuous place in each department of his establishment where employees subject to the provisions of § 730.2 are working such notices of this part as shall be prescribed from time to time by the Administrator of the Wage and Hour Division of the U.S. Department of Labor and shall give such other notice as the Administrator may prescribe.

SUBCHAPTER B—STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

PART 775—GENERAL

Sec.
775.0 General enforcement policy.
775.1 Advisory interpretations announced by the Administrator.
775.2 Special enforcement policy concerning States and political subdivisions.
775.3 Nontraditional functions of States and their political subdivisions.
775.4 Traditonal functions of States and their political subdivisions.

Authority: 52 Stat. 1060, 29 U.S.C. 201 et seq., unless otherwise noted.

§ 775.0 General enforcement policy.

(a) In order to clarify at this time the practices and policies which will guide the administration and enforcement of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201-219), and the Walsh-Healey Act as amended (49 Stat. 2036, 41 U.S.C. 35-45), as affected by the Portal-to-Portal Act of 1947 (61 Stat. 84; 29 U.S.C. Sup. 251 et seq.), the following policy is announced effective June 30, 1947.

(b) The investigation, inspection and enforcement activities of all officers and agencies of the Department of Labor as they relate to the Fair Labor Standards Act and the Walsh-Healey Act will be carried out on the basis that all employers in all industries whose activities are subject to the provisions of the Fair Labor Standards Act or the Walsh-Healey Act are responsible for strict compliance with the provisions thereof and the regulations issued pursuant thereto.

(c) Any statements, orders, or instructions inconsistent herewith are rescinded.

(49 Stat. 2036, 61 Stat. 84; 29 U.S.C. 251 et seq., 41 U.S.C. 35 et seq.)

[12 FR 3915, June 17, 1947]

§ 775.1 Advisory interpretations announced by the Administrator.

Advisory interpretations announced by the Administrator serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties unless he is directed otherwise by the authoritative ruling of the courts, or unless he shall subsequently decide that his prior interpretation is incorrect.

[11 FR 14099, Dec. 5, 1946]

§ 775.2 Special enforcement policy concerning States and political subdivisions.

(a) On June 24, 1976, the United States Supreme Court ruled in *National League of Cities, et al.* v. *Usery*, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) are not constitutionally applicable to the integral operations of the States and their political subdivisions in areas of traditional governmental functions. Such areas include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, amoung others, the operation of a railroad by a State, 426 U.S. at 854, n.18.

(b) In view of the *National League* decision, the Secretary will not file suit to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivisions unless at least 30 days notice has first been given that, in the opinion of the Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question or by general notification by publication in the Federal Register in the form of amendments to § 775.3. A reasonable opportunity will be allowed the employing body, after the notice of the administrative determination, to come into compliance voluntarily before suit is brought.

(c) Each such notice will be made available to wage-hour reporting services and to any interested person or association, for information or further publication, except for deletions reasonably necessary to protect the privacy of individual employers and employees.

(d) Because of the complexity of the questions raised by the *National League* decision, it would be inappropriate to seek liquidated damages in addition to back pay in cases to enforce the minimum wage and overtime compensation provisions of the Act against States or their political subdivisions, except as to activities determined by prior controlling judicial decision, or by prior administrative ruling published in the FEDERAL REGISTER, not to be integral operations in areas of traditional governmental functions. The Secretary will therefore not seek liquidated damages as to activities not covered by such decision or ruling, or for periods of employment prior to the publication of such decision or ruling.

(e) As already noted, the *National League* decision applies only to the minimum wage and overtime compensation provisions of the FLSA. This section and § 775.3 accordingly do not apply to claims arising under:

(1) The Equal Pay Act of 1963 (see *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (C.A. 3, 1976), cert. denied 430 U.S. 946 (1977); *Usery* v. *Charleston County School District*, 588 F.2d 1169 (C.A. 4, 1977); *Pearce* v. *Wichita County*, 590 F.2d 128 (C.A. 5, 1979); *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (C.A. 6, 1978); and *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (C.A. 7, 1978)).

(2) The Age Discrimination in Employment Act of 1967 (see *Arritt* v. *Grissell* , 567 F.2d 1267 (C.A. 4, 1977)); *Usery* v. *Bd. of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah 1976); *Aaron* v. *Davis*, 424 F. Supp. 1238 (W.D. Ark. 1976); and *Remmick* v. *Barnes County*, 435 F. Supp. 914 (D. N.D. 1977).

(3) The child labor provisions of the Fair Labor Standards Act.

(4) The protective provisions of Section 15(a)(3) of the Act, making it unlawful to discriminate against any employee for participating or assisting in FLSA proceedings.

[44 FR 75629, Dec. 21, 1979]

§ 775.3 Nontraditional functions of States and their political subdivisions.

(a) In the *National League* decision, it was made clear that the operation of a railroad by a State or its political subdivision is not an integral operation in the area of traditional governmental functions. 426 U.S. 833, 854 n.18.

(b) For the purpose of the notice referred to in § 775.2(b), the Administrator has determined that the following functions of a State or its political subdivisions are not traditional. From time to time, this section will be amended to list other such functions determined not to be traditional. The date listed after each function is the date of original publication in the FEDERAL REGISTER. This is the effective date of the general notification described in § 775.2(b). However, where an employing body has actual notice on an earlier date of the position taken by the Administrator, that earlier date is the effective date of the specific notification described in § 775.2(b).

(1) Alcoholic beverage stores December 21, 1979.

(2) Off-track betting corporations December 21, 1979.

(3) Local mass transit systems December 21, 1979.

(4) Generation and distribution of electric power December 21, 1979.

(5) Provision of residential and commercial telephone and telegraphic communication December 21, 1979.

(6) Production and sale of organic fertilizer as a by-product of sewage processing December 21, 1979.

(7) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers December 21, 1979.

(8) Repair and maintenance of boats and marine engines for the general public December 21, 1979.

[44 FR 75630, Dec. 21, 1979]

§ 775.4 Traditional functions of States and their political subdivisions.

(a) In the *National League* decision, it was made clear that schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation are traditional functions or activities of States and their political subdivisions.

(b) In addition, the Administrator has determined that the following functions of a State or its political subdivisions are traditional (From time to time, this section will be amended to list other such functions determined to be traditional.)

(1) Libraries.

(2) Museums.

[44 FR 75630, Dec. 21, 1979]

PART 776—INTERPRETATIVE BULLETIN ON THE GENERAL COVERAGE OF THE WAGE AND HOURS PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938

Subpart A—General

Sec.
776.0 Subpart limited to individual employee coverage.

INDIVIDUAL EMPLOYEE COVERAGE

776.0a Introductory statement.

HOW COVERAGE IS DETERMINED

776.1 General interpretative guides.
776.2 Employee basis of coverage.
776.3 Persons engaging in both covered and noncovered activities.
776.4 Workweek standard.
776.5 Coverage not dependent on method of compensation.
776.6 Coverage not dependent on place of work.
776.7 Geographical scope of coverage.

ENGAGING "IN COMMERCE"

776.8 The statutory provisions.
776.9 General scope of "in commerce" coverage.
776.10 Employees participating in the actual movement of commerce.
776.11 Employees doing work related to instrumentalities of commerce.
776.12 Employees traveling across State lines.
776.13 Commerce crossing international boundaries.

ENGAGING IN "THE PRODUCTION OF GOODS FOR COMMERCE"

776.14 Elements of "production" coverage.
776.15 "Production."
776.16 Employment in "producing, . . . or in any other manner working on" goods.
776.17 Employment in a "closely related process or occupation directly essential to" production of goods.
Sec.
776.18 Employees of producers for commerce.
776.19 Employees of independent employers meeting needs of producers for commerce.
776.20 "Goods."
776.21 "For" commerce.

Subpart B—Construction Industry

776.22 Subpart limited to individual employee coverage.

ENTERPRISE COVERAGE

776.22a Extension of coverage to employment in certain enterprises.

INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

776.22b Guiding principles.
776.23 Employment in the construction industry.
776.24 Travel in connection with construction projects.
776.25 Regular and recurring activities as basis of coverage.
776.26 Relationship of the construction work to the covered facility.
776.27 Construction which is related to covered production.
776.28 Covered preparatory activities.
776.29 Instrumentalities and channels of interstate commerce.
776.30 Construction performed on temporarily idle facilities.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

Subpart A—General

SOURCE: 15 FR 2925, May 17, 1950, unless otherwise noted.

§ 776.0 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of general coverage of the Act on the traditional basis of engagement by individual employees "in commerce or in the production of goods for commerce". The 1961 and 1966 amendments broadened coverage by extending it to other employees on an "enterprise" basis, when "employed in an enterprise engaged in commerce or in the production of goods for commerce" as defined in section 3 (r), (s), of the present Act. Em-

BEST DOCUMENT AVAILABLE

ployees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in a covered enterprise as defined in the amendments. Questions of "enterprise coverage" not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, D.C. 20210 or assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE

§ 776.0a Introductory statement.

(a) *Scope and significance of this part.* (1) The Fair Labor Standards Act of 1938 [1] (hereinafter referred to as the Act), brings within the general coverage of its wage and hours provisions every employee who is "engaged in commerce or in the production of goods for commerce." [2] What employees are so engaged must be ascertained in the light of the definitions of "commerce", "goods", and "produced" which are set forth in the Act as amended by the Fair Labor Standards Amendments of 1949, [3] giving due regard to authoritative interpretations by the courts and to the legislative history of the act, as amended. Interpretations of the Administrator of the Wage and Hour Division with respect to this general coverage are set forth in this part to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." [4] These interpretations with respect to the general coverage of the wage and hours provisions of the Act, indicate the construction of the law which the Administrator believes to be correct and which will guide him in the performance of his administrative duties under the Act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon reexamination of an interpretation, that it is incorrect.

(2) Under the Portal-to-Portal Act of 1947, [5] interpretations of the Administrator may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations contained in this bulletin are interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act, so long as they remain effective and are not modified, amended, rescinded, or determined by

---

[1] Public Law 718, 75th Cong., 3d sess. (52 Stat. 1060), as amended by the Act of June 26, 1940 (Pub. Res. No. 88, 76th Cong., 3d sess., 54 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 1095), effective July 16, 1946; by the Portal-to-Portal Act of 1947, approved May 14, 1947 (61 Stat. 84); and by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (Public Law 393, 81st Cong., 1st sess., 63 Stat. 910); by Reorganization Plan No. 6 of 1950 (15 FR 3174), effective May 24, 1950; and by the Fair Labor Standards Amendments of 1955, approved August 12, 1955 (Public Law 381, 84th Cong., 1st sess., C. 867, 69 Stat. 711).

[2] The requirement of section 6 as to minimum wages is: "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—" (not less than $1.00 an hour, except in Puerto Rico and the Virgin Islands to which special provisions apply).

The requirement of section 7 as to maximum hours which an employee may work without receiving extra pay for overtime is: "no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[3] Public Law 393, 81st Cong., 1st sess. (63 Stat. 910). These amendments, effective January 25, 1950, leave the existing law unchanged except as to provisions specifically amended and the addition of certain new provisions. Section 3(b) of the act, defining "commerce", and section 3(j), defining "produced", were specifically amended as explained in §§ 776.13 and 776.17(a) herein.

[4] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138.

[5] Public Law 49, 80th Cong., 1st sess. (61 Stat. 84), discussed in Part 790 of this chapter.

BEST DOCUMENT AVAILABLE

judicial authority to be incorrect. However, the omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy.

(b) *Exemptions and child labor provisions not discussed.* This part does not deal with the various specific exemptions provided in the statute, under which certain employees engaged in commerce or in the production of goods for commerce and thus within the general coverage of the wage and hours provisions are wholly or partially excluded from the protection of the act's minimum-wage and overtime-pay requirements. Some of these exemptions are self-executing; others call for definitions or other action by the Administrator. Regulations and interpretations relating to specific exemptions may be found in other parts of this chapter. Coverage and exemptions under the child labor provisions of the act are discussed in a separate interpretative bulletin (§§ 570.101 to 570.121 of this chapter) issued by the Secretary of Labor.

(c) *Earlier interpretations superseded.* All general and specific interpretations issued prior to July 11, 1947, with respect to the general coverage of the wage and hours provisions of the act were rescinded and withdrawn by § 776.0(b) of the general statement on this subject, published in the FEDERAL REGISTER on that date as Part 776 of this chapter (12 FR 4583). To the extent that interpretations contained in such general statement or in releases, opinion letters, and other statements issued on or after July 11, 1947, are inconsistent with the provisions of the Fair Labor Standards Amendments of 1949, they do not continue in effect after January 24, 1950.[6] Effective on the date of its publication in the FEDERAL REGISTER, Subpart A of this interpretative bulletin replaces and supersedes the general statement previously published as Part 776 of this chapter, which statement is withdrawn. All other administrative rulings, interpretations, practices and enforcement policies relating to the general coverage of the wages and hours provisions of the act and not withdrawn prior to such date are, to the extent that they are inconsistent with or in conflict with the principles stated in this interpretative bulletin, hereby rescinded and withdrawn.

[15 FR 2925, May 17, 1950, as amended at 21 FR 1448, Mar. 6, 1956. Redesignated, 35 FR 5543, Apr. 3, 1970]

HOW COVERAGE IS DETERMINED

§ 776.1 General interpretative guides.

The congressional policy under which employees "engaged in commerce or in the production of goods for commerce" are brought within the general coverage of the act's wage and hours provisions is stated in section 2 of the act. This section makes it clear that the congressional power to regulate interstate and foreign commerce is exercised in this act in order to remedy certain evils, namely, "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and the general well being of workers" which Congress found "(a) causes commerce and the channels and instrumentalities of commerce to be used to perpetuate such labor conditions among the workers of the several States; (b) burdens commerce and the free flow of goods in commerce; (c) constitutes an unfair method of competition in commerce; (d) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce and (e) interferes with the orderly and fair marketing of goods in commerce." In carrying out these broad remedial purposes, however, the Congress did not choose to make the scope of the act coextensive in all respects with the limits of its power over commerce or to apply it to all activities affecting commerce.[7] Congress delimited the area in which the act operates by providing for certain exceptions and exemptions, and by making wage-hour coverage applicable only to employees who are "engaged in" either "commerce", as defined in the act, or "production" of "goods" for such commerce, within the meaning of the act's definitions of these terms. The Fair Labor Standards Amendments of 1949 indicate an intention to restrict somewhat the category of employees within the reach of the act under the former definition of "produced" and to expand to some extent the group covered under the former definition of "commerce." In his interpretations, the Administrator will endeavor to give effect to both the broad remedial purposes of the act and the limitations on its application, seeking guidance in his task from the terms of the statute, from authoritative court decisions, and from the legislative history of the act, as amended.[8]

---

[6] Section 16(c) of the Fair Labor Standards Amendments of 1949 (63 Stat. 910) provides: "Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this act."

§ 776.2 Employee basis of coverage.

(a) The coverage of the act's wage and hours provisions as described in sections 6 and 7 does not deal in a blanket way with industries as a whole. Thus, in section 6, it is provided that every employer shall pay the statutory minimum wage to "each of his employees who is engaged in commerce or in the production of goods for commerce." It thus becomes primarily an individual matter as to the nature of the employment of the particular employee. Some employers in a given industry may have no employees covered by the act; other employers in the industry may have some employees covered by the act, and not others; still other employers in the industry may have all their employees within the act's coverage. If, after considering all relevant factors, employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the act on the ground that he is not "engaged in commerce or in the production of goods for commerce." To the extent that his employees are so engaged, he is himself so engaged.[9]

(b) In determining whether an individual employee is within the coverage of the wage and hours provisions, however, the relationship of an employer's business to commerce or to the production of goods for commerce may sometimes be an important indication of the character of the employee's work.[10] It is apparent, too, from the 1949 amendment to the definition of "produced" and its legislative history that an examination of the character of the employer's business will in some borderline situations be necessary in determining whether the employees' occupation bears the requisite close relationship to production for commerce.[11]

---

[7] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *10 East 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578; *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490; *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. 2d 52 (C.A. 8); *Armstrong* v. *Walling*, 161 F. 2d 515 (C.A. 1); *Bowie* v. *Gonzalez*, 117 F. 2d 11 (C.A. 1).

[8] Footnote references to some of the relevant court decisions are made for the assistance of readers who may be interested in such decisions.

Footnote reference to the legislative history of the 1949 amendments are made at points in this part where it is believed they may be helpful. References to the *Statement of the Managers on the Part of the House*, appended to the Conference Report on the amendments (H. Rept. No. 1453, 81st Cong., 1st sess.) are abbreviated: H. Mgrs. St. 1949, p. —. References to the *Statement of a majority of the Senate Conferees*, 95 Cong. Rec., October 19, 1949 at 15372-15377 are abbreviated: Sen. St., 1949 Cong. Rec. References to the Congressional Record are to the 1949 daily issues, the permanent volumes being unavailable at the time this part was prepared.

[9] *Kirschbaum* v. *Walling*, 316 U.S. 517. See also *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178.

[10] *Borden Co.* v. *Borella*, 325 U.S. 679; *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578; *Armour & Co.* v. *Wantock*, 323 U.S. 126; *Donovan* v. *Shell Oil Co.*, 168 F. 2d 229 (C.A. 4); *Hertz Driveurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Horton* v. *Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437.

§ 776.3 Persons engaging in both covered and noncovered activities.

The act applies to employees "engaged in commerce or in the production of goods for commerce" without regard to whether such employees, or their employer, are also engaged in other activities which would not bring them within the coverage of the act. The act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. Sections 6 and 7 refer to "each" and "any" employee so engaged, and section 15(a)(1) prohibits the introduction into the channels of interstate or foreign commerce of "any" goods in the production of which "any" employee was employed in violation of section 6 or section 7. Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the act.[12] This does not, however, necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the act is, by reason of that fact, thereafter indefinitely entitled to its benefits.

§ 776.4 Workweek standard.

(a) The workweek is to be taken as the standard in determining the applicability of the act.[13] Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the act for all the time worked in that week, unless exempted therefrom by some specific provision of the act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the act.

(b) It is thus recognized that an employee may be subject to the act in one workweek and not in the next. It is likewise true that some employees of an employer may be subject to the act and others not. But the burden of effecting segregation between covered and noncovered work as between particular workweeks for a given employee or as between different groups of employees is upon the employer. Where covered work is being regularly or recurrently performed by his employees, and the employer seeks to segregate such work and thereby relieve himself of his obligations under sections 6 and 7 with respect to particular employees in particular workweeks, he should be prepared to show, and to demonstrate from his records, that such employees in those workweeks did not engage in any activities in interstate or foreign commerce or in the production of goods for such commerce, which would necessarily include a showing that such employees did not handle or work on goods or materials shipped in commerce or used in production of goods for commerce, or engage in any other work closely related and directly essential to production of goods for commerce.[14] The Division's experience has indicated that much so-called "segregation" does not satisfy these tests and that many so-called "segregated" employees are in fact engaged in commerce or in the production of goods for commerce.

---

[11] H. Mgrs. St., 1949, pp. 14, 15; Sen. St. 1949 Cong. Rec. 15372.

[12] *United States* v. *Darby*, 312 U.S. 100; *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Schmidt* v. *Peoples Telephone Union of Maryville, Missouri*, 138 F. 2d 13 (C.A. 8); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728; *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C.A. 4).

[13] See *Gordon's Transports* v. *Walling*, 162 F. 2d 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Fox-Pelletier Detective Agency*, 4 W.H. Cases 452 (W.D. Tenn.), 8 Labor Cases 62,219; *Walling* v. *Black Diamond Coal Mining Co.*, 59 F. Supp. 348 (W.D. Ky.); *Fleming* v. *Knox*, 42 F. Supp. 948 (S.D. Ga.); *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2). For a definition of the workweek, see § 778.2(c) of this chapter.

§ 776.5 Coverage not dependent on method of compensation.

The act's individual employee coverage is not limited to employees working on an hourly wage. The requirements of section 6 as to minimum wages are that "each" employee described therein shall be paid wages at a rate not less than a specified rate "an hour".[15] This does not mean that employees cannot be paid on a piecework basis or on a salary, commission, or other basis; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate. "Each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece, or by any other measurement.[16] Regulations prescribed by the Administrator (Part 516 of this chapter) provide for the keeping of records in such form as to enable compensation on a piecework or other basis to be translated into an hourly rate.[17]

[35 FR 5543, Apr. 3, 1970]

§ 776.6 Coverage not dependent on place of work.

Except for the general geographical limitations discussed in § 776.7, the act contains no prescription as to the place where the employee must work in order to come within its coverage. It follows that employees otherwise coming within the terms of the act are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere.[18] The specific provisions of the act relative to regulation of homework serve to emphasize this fact.[19]

§ 776.7 Geographical scope of coverage.

(a) The geographical areas within which the employees are to be deemed "engaged in commerce or in the production of goods for commerce" within the meaning of the act, and thus within its coverage are governed by definitions in section 3 (b), (c), and (i). In the definition of "produced" in section 3(j), "production" is expressly confined to described employments "in any State." (See § 776.15 (a).) "Commerce" is defined to mean described activities "among the several States or between any State and any place outside thereof." (See § 776.8.) "State" is defined in section 3(c) to mean "any State of the United States or the District of Columbia or any Territory or possession of the United States."

(b) Under the definitions in paragraph (a) of this section, employees within the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462, 43 U.S.C. 1331); American Samoa; Guam; Wake Island; Enewetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone are dealt with on the same basis as employees working in any of the 50 States.[20] Congress did not exercise the

---

[14] See *Guess* v. *Montague*, 140 F. 2d 500 (C.A. 4).

[15] Special exceptions are made for Puerto Rico, the Virgin Islands, and American Samoa.

[16] *United States* v. *Rosenwasser*, 323 U.S. 360.

[17] For methods of translating other forms of compensation into an hourly rate for purposes of sections 6 and 7, see Parts 531 and 778 of this chapter.

[18] *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C.A. 6); *Walling* v. *Twyeffort Inc.*, 158 F. 2d 944 (C.A. 2); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4).

[19] See 6(a)(2); Sec. 11(d).

[20] An amendment to the Fair Labor Standards Act of 1938, 71 Stat. 514 (approved

Continued

national legislative power over the District of Columbia or the Territories or possessions referred to by extending the act to purely local commerce within them.

[15 FR 2925, May 17, 1950, as amended at 35 FR 5543, Apr. 3, 1970]

ENGAGING "IN COMMERCE"

§ 776.8 The statutory provisions.

(a) The activities constituting "commerce" within the meaning of the phrase "engaged in commerce" in sections 6 and 7 of the act are defined in section 3(b) as follows:

> "Commerce" means trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof.[21]

As has been noted in § 776.7, the word "State" in this definition refers not only to any of the fifty States but also to the District of Columbia and to any Territory or possession of the United States.

(b) It should be observed that the term "commerce" is very broadly defined. The definition does not limit the term to transportation, or to the "commercial" transactions involved in "trade," although these are expressly included. Neither is the term confined to commerce in "goods." Obviously, "transportation" or "commerce" between any State and any place outside its boundaries includes a movement of persons as well as a movement of goods. And "transmission" or "communication" across State lines constitutes "commerce" under the definition, without reference to whether anything so transmitted or communicated is "goods." [22]

The inclusion of the term "commerce" in the definition of the same term as used in the act implies that no special or limited meaning is intended; rather, that the scope of the term for purposes of the act is at least as broad as it would be under concepts of "commerce" established without reference to this definition.

§ 776.9 General scope of "in commerce" coverage.

Under the definitions quoted above, it is clear that the employees who are covered by the wage and hours provisions of the act as employees "engaged in commerce" are employees doing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) "among the several States or between any State and any place outside thereof." [23] Although this does not include employees engaged in activities which merely "affect" such interstate or foreign commerce, the courts have made it clear that coverage of the act based on engaging in commerce extends to every employee employed "in the channels of" such commerce or in activities so closely related to such commerce, as a practical matter, that they

---

Aug. 30, 1957) provides that no employer shall be subject to any liability or punishment under the act with respect to work performed at any time in work places excluded from the act's coverage by this law or for work performed prior to Nov. 29, 1957, on Guam, Wake Island, or the Canal Zone; or for work performed prior to the establishment, by the Secretary, of a minimum wage rate applicable to such work in American Samoa. Work performed by employees in "a work place within a foreign country or within territory under the jurisdiction of the United States" other than those enumerated in this paragraph is exempt by this amendment from coverage under the act. When part of the work performed by an employee for an employer in any workweek is covered work performed in any State, it makes no difference where the remainder of such work is performed; the employee is entitled to the benefits of the act for the entire workweek unless he comes within some specific exemption. The reference in 71 Stat. 514 to liability for work performed in American Samoa is an extension of the relief granted by the American Samoa Labor Standards Amendments of 1956 (29 U.S.C. Supp. IV, secs. 206, 213, and 216).

[21] As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

[22] "Goods" is, however, broadly defined in the act. See § 776.20(a).

[23] "Any place outside thereof" is not limited in meaning to another State or country. Any movement between a State and a place "outside thereof" is "commerce" for purposes of the act, such as ship-to-shore communication, or transportation out of a State by ship of food, fuel, or ice to be consumed at sea before arrival at another port.

BEST DOCUMENT AVAILABLE

should be considered a part of it.[24] The courts have indicated that the words "in commerce" should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation. One practical question to be asked is whether, without the particular service, interstate or foreign commerce would be impeded, impaired, or abated;[25] others are whether the service contributes materially to the consummation of transactions in interstate or foreign commerce[26] or makes it possible for existing instrumentalities of commerce[27] to accomplish the movement of such commerce effectively and to free it from burdens or obstructions.[28]

§ 776.10 Employees participating in the actual movement of commerce.

(a) Under the principles stated in § 776.9, the wage and hours provisions of the act apply typically, but not exclusively, to employees such, as those in the telephone,[29] telegraph,[30] television, radio,[31] transportation and shipping[32] industries, since these industries serve as the actual instrumentalities and channels of interstate and foreign commerce. Similarly, employees of such businesses as banking, insurance, newspaper publishing,[33] and others which regularly utilize the channels of interstate and foreign commerce in the course of their operations, are generally covered by the act.

(b) Employees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed, are likewise engaged in commerce and within the act's coverage. This would include, for example, employees of a warehouse whose activities are connected with the receipt or distribution of goods across State lines.[34] Also, since "commerce" as used in the act includes not only "transmission" of communications but "communication" itself, employees whose work involves the continued use of the interstate mails, telegraph, telephone or similar instrumentalities for communication

---

[24] *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *McLeod* v. *Threlkeld*, 319 U.S. 491; *Boutell* v. *Walling*, 327 U.S. 463; *Pedersen* v. *J. F. Fitzgerald Constr. Co.*, 318 U.S. 740 and 324 U.S. 720.

[25] *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (C.A. 8), affirmed 327 U.S. 757; *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10).

[26] *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5), certiorari denied 318 U.S. 772. See also *Horton* v. *Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437, in which the court stated that an employee is engaged "in commerce" if his services—not too remotely but substantially and directly—aid in such commerce as defined in the act.

[27] For a list of such instrumentalities, see § 776.11.

[28] *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *J. F. Fitzgerald Constr. Co.* v. *Pedersen*, 324 U.S. 720; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C.A. 9); *Walling* v. *McCrady Constr. Co.*, 156 F. 2d 932 (C.A. 3); *Bennett* v. *V. P. Loftis*, 167 F. 2d 286 (C.A. 4); *Walling* v. *Patton-Tully Transp. Co.*, 134 F. 2d 945 (C.A. 6).

[29] *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C.A. 8); *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C.A. 5); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.).

[30] *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490; *Western Union Telegraph Co.* v. *McComb*, 165 F. 2d 65 (C.A. 6), certiorari denied 333 U.S. 862; *Moss* v. *Postal Telegraph Cable Co.*, 42 F. Supp. 807 (M.D. Ga.).

[31] *Wilson* v. *Shuman*, 140 F. 2d 644 (C.A. 8); *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391 (C.A. 6).

[32] *Overnight Motor Co.* v. *Missel*, 316 U.S. 572; *Hargis* v. *Wabash R. Co., 163 F. 2d 607 (C.A. 7)*; *Rockton & Rion R.R.* v. *Walling* 146 F. 2d 111 (C.A. 4), certiorari denied 334 U.S. 880; *Walling* v. *Keansburg Steamboat Co.*, 162 F. 2d 405 (C.A. 3); *Knudsen* v. *Lee & Simmons*, 163 F. 2d 95 (C.A. 2); *Walling* v. *Southwestern Greyhound Lines*, 65 F. Supp. 52 (W.D. Mo.); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E.D. S.C.).

[33] *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728. See also *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, and *McComb* v. *Dessau*, 9 W.H. Cases 332 (S.D. Calif.) 17 Labor Cases, 65, 643.

[34] *Phillips Co.* v. *Walling*, 324 U.S. 490; *Clyde* v. *Broderick*, 144 F. 2d 348 (C.A. 10).

BEST DOCUMENT AVAILABLE

across State lines are covered by the act.[35] This does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage. But if the employee, as a regular and recurrent part of his duties, uses such instrumentalities in obtaining or communicating information or in sending or receiving written reports or messages, or orders for goods or services, or plans or other documents across State lines, he comes within the scope of the act as an employee directly engaged in the work of "communication" between the State and places outside the State.

[15 FR 2925, May 17, 1950, as amended at 22 FR 5684, July 18, 1957]

§ 776.11 Employees doing work related to instrumentalities of commerce.

(a) Another large category of employees covered as "engaged in commerce" is comprised of employees performing the work involved in the maintenance, repair, or improvement of existing instrumentalities of commerce. (See the cases cited in footnote 28 to § 776.9. See also the discussion of coverage of employees engaged in building and construction work, in Subpart B of this part.) Typical illustrations of instrumentalities of commerce include railroads, highways, city streets, pipe lines, telephone lines, electrical transmission lines, rivers, streams, or other waterways over which interstate or foreign commerce more or less regularly moves; airports; railroad, bus, truck, or steamship terminals; telephone exchanges, radio and television stations, post offices and express offices; bridges and ferries carrying traffic moving in interstate or foreign commerce (even though within a single State); bays, harbors, piers, wharves and docks used for shipping between a State and points outside; dams, dikes, revetments and levees which directly facilitate the uninterrupted movement of commerce by enhancing or improving the usefulness of waterways, railways, and highways through control of water depth, channels or flow in streams or through control of flood waters; warehouses or distribution depots devoted to the receipt and shipment of goods in interstate or foreign commerce; ships, vehicles, and aircraft regularly used in transportation of persons or goods in commerce; and similar fixed or movable facilities on which the flow of interstate and foreign commerce depends.

(b) It is well settled that the work of employees involved in the maintenance, repair, or improvement of such existing instrumentalities of commerce is so closely related to interstate or foreign commerce as to be in practice and in legal contemplation a part of it. Included among the employees who are thus "engaged in commerce" within the meaning of the act are employees of railroads, telephone companies, and similar instrumentalities who are engaged in maintenance-of-way work;[36] employees (including office workers, guards, watchmen, etc.) engaged in work on contracts or projects for the maintenance, repair, reconstruction or other improvement of such instrumentalities of commerce as the transportation facilities of interstate railroads, highways, waterways, or other interstate transportation facilities, or interstate telegraph, telephone, or electrical transmission facilities (see Subpart B of this part); and employees engaged in the maintenance or alteration and repair of ships[37] or trucks[38] used as instrumen-

---

[35] *McComb* v. *Weller*, 9 W.H. Cases 53 (W.D. Tenn.); *Yunker* v. *Abbye Employment Agency*, 32 N.Y.S. 2d 715; (Munic. Ct. N.Y.C.); *Phillips* v. *Meeker Coop. Light & Power Asso.*, 63 F. Supp. 733 (D. Minn.); *Anderson Bros. Corp.* v. *Flynn*, 218 S.W. 2d 653 (C.A. Ky.).

[36] *Davis* v. *Rockton & Rion R.R.*, 65 F. Supp. 67 affirmed in 159 F. 2d 291 (C.A. 4); *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C.A. 5); *Palmer* v. *Howard*, 12 Lab. Cas. (CCH) par. 63, 756 (W.D. Tenn.); *Williams* v. *Atlantic Coast Lines R.R. Co.*, 1 W.M. Cases 289 (E.D. N.C. 1940), 2 Labor Cases (CCH) par. 18, 564.

[37] *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4); *Walling* v. *Keansburg Steamboat Co.*, 162 F. 2d 405 (C.A. 3).

[38] *Boutell* v. *Walling*, 327 U.S. 463; *Morris* v. *McComb*, 332 U.S. 422; *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527 (C.A. 2), certiorari denied 331 U.S. 812; *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Walling* v. *Sturm & Sons, Inc.*, 6 W.H.

Continued

BEST DOCUMENT AVAILABLE

talities of interstate or foreign commerce. Also, employees have been held covered as engaged in commerce where they perform such work as watching or guarding ships or vehicles which are regularly used in commerce[39] or maintaining, watching, or guarding warehouses, railroad or equipment yards, etc., where goods moving in interstate commerce are temporarily held,[40] or acting as porters, janitors, or in other maintenance capacities in bus stations, railroad stations, airports, or other transportation terminals.[41]

(c) On the other hand, work which is less immediately related to the functioning of instrumentalities of commerce than is the case in the foregoing examples may be too remote from interstate or foreign commerce to establish coverage on the ground that the employee performing it is "engaged in commerce." This has been held true, for example, of a cook preparing meals for workmen who are repairing tracks over which interstate trains operate,[42] and of a porter caring for washrooms and lockers in a garage which is not an instrumentality of commerce, where trucks used both in intrastate and interstate commerce are serviced.[43]

(d) There are other situations in which employees are engaged "in commerce" and therefore within the coverage of the act because they contribute directly to the movement of commerce by providing goods or facilities to be used or consumed by instrumentalities of commerce in the direct furtherance of their activities of transportation, communication, transmission, or other movement in interstate or foreign commerce. Thus, for example, employees are considered engaged "in commerce" where they provide to railroads, radio stations, airports, telephone exchanges, or other similar instrumentalities of commerce such things as electric energy,[44] steam, fuel, or water, which are required for the movement of the commerce carried by such instrumentalities.[45] Such work is "so related to the actual movement of commerce as to be considered an essential and indispensable part thereof, and without which it would be impeded or impaired." [46]

§ 776.12 Employees traveling across State lines.

Questions are frequently asked as to whether the fact that an employee crosses State lines in connection with his employment brings him within the act's coverage as an employee "engaged in commerce." Typical of the employments in which such questions arise are those of traveling service men, traveling buyers, traveling construction crews, collectors, and em-

---

Cases 131 (D.N.J.) 10 Labor Cases (CCH) par. 62, 980.

As to exemptions from the overtime requirements for mechanics employed by motor carriers, see Part 782 of this chapter. For exemptions applicable to retail or service establishments, see Part 779 of this chapter.

[39] *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4); *Agosto* v. *Rocafort*, 5 W.H. Cases 176 (D.P.R.), 9 Labor Cases (CCH) par. 62, 610; *Cannon* v. *Miller*, 155 F. 2d 500 (S. Ct. Wash.).

[40] *Engebretson* v. *E. J. Albrecht Co.*, 150 F. 2d 602 (C.A. 7); *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310 (C.A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5); certiorari denied 318 U.S. 772; *Reliance Storage & Insp. Co.* v. *Hubbard*, 50 F. Supp. 1012 (W.D. Va.); *Walling* v. *Fox-Pelletier Detective Agency*, 4 W.H. Cases 452 (W.D. Tenn. 1944); 8 Labor Cases (CCH) par. 62, 219; *McComb* v. *Russell Co.*, 9 W.H. Cases 258 (D. Miss. 1949), 17 Labor Cases (CCH) par. 65, 519.

[41] *Mornford* v. *Andrews*, 151 F. 2d 511 (C.A. 5); *Hargis* v. *Wabash R. Co.* 163 F. 2d 607 (C.A. 7); *Walling* v. *Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E.D. S.C.); *Rouch* v. *Continental Oil Co.*, 55 F. Supp. 315 (D. Kans.); see also *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386.

[42] *McLeod* v. *Threlkeld*, 319 U.S. 491.

[43] *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527, certiorari denied 331 U.S. 812 (use in interstate commerce of trucks serviced was from 10 to 25 percent of total use).

[44] *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C.A. 10); *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2).

[45] Such employees would also be covered as engaged in the production of goods for commerce. See *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2); also § 776.21(b).

[46] *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636, 640 (C.A. 10).

BEST DOCUMENT AVAILABLE

ployees of such organizations as circuses, carnivals, road shows, and orchestras. The area of coverage in such situations cannot be delimited by any exact formula, since questions of degree are necessarily involved. If the employee transports material or equipment or other persons across State lines or within a particular State as a part of an interstate movement, it is clear of course, that he is engaging in commerce.[47] And as a general rule, employees who are regularly engaged in traveling across State lines in the performance of their duties (as distinguished from merely going to and from their homes or lodgings in commuting to a work place) are engaged in commerce and covered by the act.[48] On the other hand, it is equally plain that an employee who, in isolated or sporadic instances, happens to cross a State line in the course of his employment, which is otherwise intrastate in character, is not, for that sole reason, covered by the act. Nor would a man who occasionally moves to another State in order to pursue an essentially local trade or occupation there become an employee "engaged in commerce" by virtue of that fact alone. Doubtful questions arising in the area between the two extremes must be resolved on the basis of the facts in each individual case.

§ 776.13 Commerce crossing international boundaries.

Under the act, as amended, an employee engaged in "trade commerce, transportation, transmission, or communication" between any State and any place outside thereof is covered by the act regardless of whether the "place outside" is another State or is a foreign country or is some other place. Before the amendment to section 3(b) which became effective January 25, 1950, employees whose work related solely to the flow of commerce into a State from places outside it which were not "States" as defined in the act were not employees engaged in "commerce" for purposes of the act, although employees whose work was concerned with the flow of commerce out of the State to such places were so engaged.[49] This placed employees of importers in a less favorable position under the act than the employees of exporters. This inequality was removed by the amendment to section 3(b).[50] Accordingly, employees performing work in connection with the importation of goods from foreign countries are engaged "in commerce" and covered by the act, as amended. The coverage of such employees, as of those performing work in connection with the exportation of goods to foreign countries, is determined by the same principles as in the case of employees whose work is connected with goods procured from or sent to other States.

ENGAGING IN "THE PRODUCTION OF GOODS FOR COMMERCE"

§ 776.14 Elements of "production" coverage.

Sections 6 and 7 of the act, as has been noted, cover not only employees who are engaged "in commerce" as explained above, but also "each" and "any" employee who is engaged in the "production" of "goods" for "commerce". What employees are so engaged can be determined only by references to the very comprehensive definitions which Congress has supplied to make clear what is meant by "production", by "goods," and by "commerce" as those words are used in sections 6 and 7. In the light of these definitions, there are three interrelated elements of coverage to be considered in determining whether an employee is engaged in the production of goods for commerce: (a) There must be "production"; (b) such production must be of "goods"; (c) such production of goods must be "for commerce";

---

[47] The employee may, however, be exempt from the overtime provisions of the act under section 13(b)(1). See Part 792 of this chapter.

[48] *Reck* v. *Zarmocay*, 264 App. Div. 520, 36 N.Y.S. 2d 394; *Colbeck* v. *Dairyland Creamery Co.*, 17 N.W. 2d 262 (S. Ct. S.D.).

[49] The definition of "commerce" previously referred to commerce "from any State to any place outside thereof." The amendment substituted "between" for "from" and "and" for "to" in this clause.

[50] H. Mgrs. St., 1949, pp. 13, 14.

BEST DOCUMENT AVAILABLE

all within the meaning of the act.[51] The three elements of "production" coverage are discussed in order in the sections following.

§ 776.15 "Production."

(a) *The statutory provisions.* The activities constituting "production" within the meaning of the phrase "engaged in * * * production of goods for commerce" are defined in the act[52] as follows:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

The act bars from interstate commerce "any" goods in the production of which "any" employee was employed in violation of the minimum-wage or overtime-pay provisions,[53] and provides that in determining, for purposes of this provision, whether an employee was employed in the production of such goods:

> * * * proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.[54]

(b) *General scope of "production" coverage.* The statutory provisions quoted in paragraph (a) of this section, show that for purposes of the act, wherever goods are being produced for interstate or foreign commerce, the employees who are covered as "engaged in the production" of such goods, include, in general, all those whose work may fairly be said to be a part of their employer's production of such goods,[55] and include those whose work is closely related and directly essential thereto,[56] whether employed by the same or a different employee. (See §§ 776.17 to 776.19.) Typically, but not exclusively, this includes that large group of employees engaged in mines, oil fields, quarries, and manufacturing, processing, or distributing plants where goods are produced for commerce. The employees covered as engaged in "production" are not limited, however, to those engaged in actual physical work on the product itself or to those in the factories, mines, warehouses, or other place of employment where goods intended for commerce are being produced. If the requisite relationship to production of such goods is present, an employee is covered, regardless of whether his work brings him into actual contact with such goods or into the establish-

---

[51] These elements need not be considered if the employee would be covered in any event because engaged "in commerce" under the principles discussed in preceding sections of this part.

[52] Act, sec. 3(j). This definition is also applicable in determining coverage of the child labor provisions of the act. See Part 4 of this title.

[53] Act, sec. 15(a)(1). The only exceptions are stated in the section itself, which provides that "it shall be unlawful for any person—(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;"

[54] Act, sec. 15(b).

[55] *Borden Co.* v. *Borella*, 325 U.S. 679; *Armour & Co.* v. *Wantock*, 323 U.S. 126. See also paragraph (c) of this section.

[56] *Kirschbaum* v. *Walling*, 316 U.S. 517; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372.

BEST DOCUMENT AVAILABLE

ments where they are produced, and even though his employer may be someone other than the producer of the goods for commerce.[57] As explained more fully in the sections following, the act's "production" coverage embraces many employees who serve productive enterprises in capacities which do not involve working directly on goods produced but which are nevertheless closely related and directly essential to successful operations in producing goods for interstate or foreign commerce. And as a general rule, in conformity with the provisions of the act quoted in paragraph (a) of this section, an employee will be considered to be within the general coverage of the wage and hours provisions if he is working in a place of employment where goods sold or shipped in interstate commerce or foreign commerce are being produced, unless the employer maintains the burden of establishing that the employee's functions are so definitely segregated from such production that they should not be regarded as closely related and directly essential thereto.[58]

§ 776.16 Employment in "producing, * * * or in any other manner working on" goods.

(a) *Coverage in general.* Employees employed in "producing, manufacturing, mining, handling, or in any other manner working on" goods (as defined in the act, including parts or ingredients thereof) for interstate or foreign commerce are considered actually engaged in the "production" of such goods, within the meaning of the act. Such employees have been within the general coverage of the wage and hours provisions since enactment of the act in 1938, and remain so under the Fair Labor Standards Amendments of 1949.[59]

(b) *Activities constituting actual "production" under statutory definition.* It will be noted that the actual productive work described in this portion of the definition of "produced" includes not only the work involved in making the products of mining, manufacturing, or processing operations, but also includes "handling, transporting, or in any other manner working on" goods. This is so, regardless of whether the goods are to be further processed or are so-called "finished goods." The Supreme Court has stated that this language of the definition brings within the scope of the term "production," as used in the act, "every step in putting the subject to commerce in a state to enter commerce," including "all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce," and "every kind of incidental operation preparatory to putting goods into the stream of commerce."[60]

However, where employees of a common carrier, by handling or working on goods, accomplish the interstate transit or movement in commerce itself, such handling or working on the goods is not "production." The employees in that event are covered only under the phrase "engaged in commerce."[61]

(c) *Physical labor.* It is clear from the principles stated in paragraphs (a) and (b) of this section, that employees in shipping rooms, warehouses, distribution yards, grain elevators, etc., who

---

[57] *Borden Co.* v. *Borella,* 325 U.S. 679; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Walton* v. *Southern Package Corp. 320 U.S. 540.*

[58] *Guess* v. *Montague,* 140 F. 2d 500 (C.A. 4). *Cf. Armour & Co.* v. *Wantock,* 323 U.S. 126.

[59] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

[60] *Western Union Tel. Co.* v. *Lenroot,* 323 U.S. 490. See, to the same effect, *Walling* v. *Friend,* 156 F. 2d 429 (C.A. 8); *Walling* v. *Commet Carriers,* 151 F. 2d 107 (C.A. 2); *Phillips* v. *Star Overall Dry Cleaning Laundry Co.,* 149 F. 2d 416 (C.A. 2); certiorari denied 327 U.S. 780; *Walling* v. *Griffin Cartage Co.,* 62 F. Supp. 396, affirmed in 153 F. 2d 587 (C.A. 6). For examples, see paragraphs (c) and (d) of this section. Employees who are not engaged in the actual production activities described in section 3(j) of the act are not engaged in "production" unless their work is "closely related" and "directly essential" to such production. See §§ 776.17-776.19.

[61] *Western Union Tel. Co.* v. *Lenroot,* 323 U.S. 490. For examples, see paragraph (c) of this section.

BEST DOCUMENT AVAILABLE

sort, screen, grade, store, pack, label, address or otherwise handle or work on goods in preparation for shipment of the goods out of the State are engaged in the production of goods for commerce within the meaning of the act.[62] The same has been held to be true of employees doing such work as handling ingredients (scrap iron) of steel used in building ships which will move in commerce;[63] handling and caring for livestock at stockyards where the livestock are destined for interstate shipment as such[64] or as meat products;[65] handling or transporting containers to be used in shipping products interstate;[66] transporting, within a single State, oil to a refinery[67] or lumber to a mill,[68] where products of the refinery or mill will be sent out of the State; transporting parts or ingredients of other types of goods or the finished goods themselves between processors, manufacturers, and storage places located in a single State, where goods so transported will leave the State in the same or an altered form;[69] and repairing or otherwise working on ships,[70] vehicles,[71] machinery,[72] clothing,[73] or other goods which may be expected to move in interstate commerce.

These examples are, of course, illustrative rather than exhaustive. Some of them relate to situations in which the handling or working on goods for interstate or foreign commerce may constitute not only "production for commerce" but also engaging "in commerce" because the activities are so closely related to commerce as to be for all practical purposes a part of it.[74] However, as noted in paragraph (b) of this section, handling or working on goods constitutes engagement in "commerce" only and not engagement in "production" of the goods when it is done by employees of a common carrier and is itself the means whereby interstate transit or movement of the goods by the carrier is accomplished. Thus, employees of a telegraph company preparing messages for interstate transmission, television cameramen photographing sports or news events for simultaneous viewing at television receiving sets in other State, and railroad train crews or truck drivers hauling goods from one State to another are not engaged in the "production" of goods by virtue of such activities, but are covered by the act only as employees "engaged in commerce."

(d) *Nonmanual work.* The "production" described by the phrase "producing * * * or in any other manner work-

---

[62] *McComb* v. *Wyandotte Furn. Co.*, 169 F. 2d 766 (C.A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C.A. 6); *Walling* v. *Home Loose Leaf Tobacco Warehouse Co.*, 51 F. Supp. 914 (E.D. Ky.); *Walling* v. *Yeakley*. 3 W.H. Cases 27, modified and affirmed in 140 F. 2d 830 (C.A. 10); *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W.D. Ky.); *Walling* v. *McCracken County Peach Growers Assn.*, 50 F. Supp. 900 (W.D. Ky). See also *Clyde* v. *Broderick*, 144 F. 2d 348 (C.A. 10).

[63] *Bracey* v. *Luray*, 138 F. 2d 8 (C.A. 4).

[64] *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8).

[65] *Fleming* v. *Swift & Co.*, 41 F. Supp. 825, affirmed in 131 F. 2d 249 (C.A. 7); *McComb* v. *Benz Co.*, 9 W.H. Cases 277 (S.D. Ind.).

[66] *Walling* v. *Villaume Box & Lbr. Co.*, 58 F. Supp. 150 (D. Minn.).

[67] *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Boling* v. *R. J. Allison Co., Inc.*, 4 W.H. Cases 500 (N.D. Okla.).

[68] *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C.A. 8).

[69] *Walling* v. *Griffin Cartage Co.*, 62 F. Supp. 696, affirmed in 153 F. 2d 587 (C.A. 6); *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C.A. 2).

[70] *Slover* v. *Walthen*, 140 F. 2d 258 (C.A. 4).

[71] *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Walling* v. *Armbruster*, 51 F. Supp. 166 (W.D. Ark.); *McComb* v. *Weller*, 9. W.H. Cases 53 (W.D. Tenn.), 17 Labor Cases (CCH) par. 65, 332; *Walling* v. *Strum & Sons*, 6 W.H. Cases 131 (D. N.J.), 11 Labor Cases (CCH) par. 63, 249.

[72] *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C.A. 7); *Guess* v. *Montague*, 140 F. 2d 500 (C.A. 4).

[73] *Walling* v. *Belikoff*, 147 F. 2d 1008 (C.A. 2); *Campbell* v. *Zavelo*, 243 Ala. 361, 10 So. 2d 29; *Phillips* v. *Star Overall Dry Cleaning Laundry Co.*, 149 F. 2d 416 (C.A. 2), certiorari denied 327 U.S. 780.

[74] *Slover* v. *Walthen*, 140 F. 2d 258 (C.A. 4); *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8); *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C.A. 7); *Walling* v. *Strum & Sons*, 6 W.H. Cases 131 (D. N.J.).

BEST DOCUMENT AVAILABLE

ing on" goods includes not only the manual, physical labor involved in processing and working on the tangible products of a producing enterprise, but equally the administration, planning, management, and control of the various physical processes together with the accompanying accounting and clerical activities.[75] An enterprise producing goods for commerce does not accomplish the actual production of such goods solely with employees performing physical labor on them. Other employees may be equally important in actually producing the goods, such as employees who conceive and direct policies of the enterprise; employees who dictate, control, and coordinate the steps involved in the physical production of goods; employees who maintain detailed and meticulous supervision of productive activities; and employees who direct the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the labor policies, and the maintenance of the plants and equipment. (For regulations governing exemption from the wage and hours provisions of employees employed in a bona fide executive, administrative, or professional capacity, see Part 541 of this chapter.) Employees who perform these and similar activities are an integral part of the coordinated productive pattern of a modern industrial organization. The Supreme Court of the United States has held that from a productive standpoint and for purposes of the act the employees who perform such activities "are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products" in the manufacturing plant or other producing facilities of the enterprise.[76]

§ 776.17 Employment in a "closely related process or occupation directly essential to" production of goods.

(a) *Coverage in general.* Employees who are not actually "producing * * * or in any other manner working on" goods for commerce are, nevertheless, engaged in the "production" of such goods within the meaning of the act and therefore within its general coverage if they are employed "in any closely related process or occupation directly essential to the production thereof, in any State."[77] Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged "in any process or occupation necessary to the production" of goods for commerce. The amendments deleted the word "necessary" and substituted the words "closely related" and "directly essential" contained in the present law. The words "directly essential" were adopted by the Conference Committee in lieu of the word "indispensable" contained in the amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is both "closely related" and "directly essential" to the production of goods for interstate or foreign commerce.

The legislative history shows that the new language in the final clause of section 3(j) of the act is intended to narrow, and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither "in commerce" nor in actually "producing or in any other manner working on" goods for commerce) whose coverage under the act formerly depended on whether their work was "necessary" to the production of goods for commerce. Some employees whose work might meet the "necessary" test are now outside the coverage of the act because their work is not "closely

---

[75] *Borden Co.* v. *Borella,* 325 U.S. 679; *Hertz Drivurself Stations.* v. *United States,* 150 F. 2d 923 (C.A. 8); *Callus* v. *10 E. 40th St. Bldg.,* 146 F. 2d 438 (C.A. 2), reversed on other grounds in 325 U.S. 578.

[76] *Borden Co.* v. *Borella,* 325 U.S. 679, 683.

[77] If coverage of an employee is determined to exist on either basis, it is, of course, not necessary to determine whether the employee would also be covered on the other ground. See *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. 2d 42 (C.A. 5), affirmed in 317 U.S. 88.

BEST DOCUMENT AVAILABLE

related" and "directly essential" to such production; others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.[78]

The scope of coverage under the "closely related" and "directly essential" language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress [78] including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language,[79] this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier "necessary" test. However, while the coverage or noncoverage of many employees may be determined with reasonable certainty, no precise line for inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.

(b) *Meaning of "closely related" and "directly essential".* The terms "closely related" and "directly essential" are not susceptible of precise definition; as used in the act they together describe a situation in which, under all the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce (1) which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.[80]

Not all activities that are "closely related" to production will be "directly essential" to it, nor will all activities "directly essential" to production meet the "closely related" test. For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work "closely related" to such production, but some such employees may be outside the coverage of the act because their work is not "directly essential" to production of the goods. (For a discussion of this point and specific illustration, see § 776.18(b).) Similarly, there are some situations in which an employee performing work "directly essential" to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them "closely related" to the productive activities of another. (For a more detailed discussion and specific illustrations see § 776.19.)

(c) *Determining whether activities are "closely related" and "directly essential".* (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words "directly essential" refer only to the relationship of the employee's work to production. Work "directly essential" to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems

---

[78] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec. p. 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; colloquy between Representatives McConnell and Javits, 1949 Cong. Rec., p. 15129; of statements of Representative Barden (1949 Cong. Rec. p. 15131), Representative Brehm (1949 Cong. Rec. p. 15132), and Senator Taft (1950 Cong. Rec., p. A-1162).

[79] *See Kirschbaum Co.* v. *Walling*, 316 U.S. 517.

[80] See H. Mgrs. St. 1949, pp. 14, 15; Sen. St., 1949 Cong. Rec., p. 15372; cf. *Kirschbaum Co.* v. *Walling*, 316 U.S. 517.

BEST DOCUMENT AVAILABLE

clear, on the other hand, that the criteria for determining whether a process or occupation is "closely related" to production cannot be limited to those which show its closeness in terms of need or function.[61] It may also be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purposes with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise. (Examples of the application of these principles may be found in §§ 776.18 and 776.19.)

(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business.[62] Moreover, in some cases where particular work "directly essential" to production is performed by an employer other than the producer the degree of such essentiality may be a significant factor in determining whether the work is also "closely related" to such production. (See § 776.19.)

No one of the factors listed in this subparagraph is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite "close and immediate tie"[63] to the production of goods for interstate or foreign commerce. It is the sum of the factors relevant to each case that determines whether the particular activity is "closely related" to such production.

The application of the principles in this subparagraph is further explained and illustrated in §§ 776.18 and 776.19.

(3) In determining whether an activity is "directly essential" to production, a practical judgment is required as to whether, in terms of the function and need of such activity in successful production operations, it is "essential" and "directly" so to such operations. These are questions of degree; even "directly" essential activities (for example, machinery repair, custodial, and clerical work in a producing plant) (for other examples, see §§ 776.18(a) and 776.19) will vary in the degree of their essentiality and in the directness of the aid which they provide to production. An activity may be "directly essential" without being indispensable in the sense that it cannot be done without; yet some activities which, in a long chain of causation, might be indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new factory itself, are not "directly" essential.[64] An activity which provides

---

[61] Of course, if the need of function of the activity in production is such that the tie between them is both close and immediate (cf. *Kirschbaum Co.* v. *Walling*, 316 U.S. 517), as for example, where an employee is employed to repair electric motors which are used in factories in the production of goods for commerce, this fact may be sufficient to show both the direct essentiality and the close relationship of the employee's work to production. See *Roland Electrical Co.* v. *Walling*, 326 U.S. 657. See also § 776.19 and H. Mgrs. St., 1949, pp. 14, 15.

[62] Cf. *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *10 E. 40th St. Bldg.* v. *Callus*, 325 U.S. 578; *Schulte Co.* v. *Gangi*, 328 U.S. 108; *Borden Co.* v. *Borella*, 325 U.S. 679; *Armour & Co.* v. *Wantock*, 323 U.S. 126.

[63] See *Kirschbaum Co.* v. *Walling*, 316 U.S. 517.

[64] Cf. 10 *E. 40th St. Bldg.* v. *Callus*, 325 U.S. 578; Sen. St. 95 Cong. Rec., October 19, 1949, at 15372.

BEST DOCUMENT AVAILABLE

something essential to meet the immediate needs of production, as, for example, the manufacture of articles like machinery or tools or dies for use in the production of goods for commerce (see § 776.19(b)) will, however, be no less "directly" essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.[85]

The application of the principles in this subparagraph is further explained and illustrated in §§ 776.18 and 776.19.

§ 776.18 Employees of producers for commerce.

(a) *Covered employments illustrated.* Some illustrative examples of the employees employed by a producer of goods for interstate or foreign commerce who are or are not engaged in the "production" of such goods within the meaning of the act have already been given. Among the other employees of such a producer, doing work in connection with his production of goods for commerce, who are covered because their work, if not actually a part of such production, is "closely related" and "directly essential" to it,[86] are such employees as bookkeepers, stenographers, clerks, accountants and auditors, employees doing payroll, timekeeping and time study work, draftsmen, inspectors, testers and research workers, industrial safety men, employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise, work instructors, and other office and white collar workers; employees maintaining, servicing, repairing or improving the buildings,[87] machinery, equipment, vehicles, or other facilities used in the production of goods for commerce,[88] and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing slag or other waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are intended as illustrative, rather than exhaustive of the group of employees of a producer who are "engaged in the production" of goods for commerce, within the meaning of the act, and who are therefore entitled to its wage and hours benefits unless specifically exempted by some provision of the act.

(b) *Employments not directly essential to production distinguished.* Employees of a producer of goods for commerce are not covered as engaged in such production if they are employed solely in connection with essentially local activities which are undertaken by the employer independently of his productive operations or at most as a dispensable, collateral incident to them and not with a view to any direct function which the activities serve in production. It is clear, for example, that an employee would not be covered merely because he works as a domestic servant in the home of an employer whose factory produces goods for commerce, even though he is carried on the factory payroll. To illustrate further, a producer may engage in essentially local activities as a landlord, restaurateur, or merchant in order to utilize the opportunity for separate and additional profit from such ventures or to provide a convenient means of meeting personal needs

---

[85] See *Walling* v. *Hamner*, 64 F. Supp. 690 (W.D. Va.).

[86] See H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372. See also *Borden Co.* v. *Borella*, 325 U.S. 679.

[87] No distinction of economic or statutory significance can be drawn between such work in a building where the production of goods is carried on physically and in one where such production is administered, managed, and controlled. *Borden Co.* v. *Borella*, 324 U.S. 679.

[88] Such mechanics and laborers as machinists, carpenters, electricians, plumbers, steamfitters, plasters, glaziers, painters, metal workers, bricklayers, hod carriers, roofers, stationary engineers, their apprentices and helpers, elevator starters and operators, messengers, janitors, charwomen, porters, handy men, and other maintenance workers would come within this category.

BEST DOCUMENT AVAILABLE

of his employees. Employees exclusively employed in such activities of the producer are not engaged in work "closely related" and "directly essential" to his production of goods for commerce merely because they provide residential, eating, or other living facilities for his employees who are engaged in the production of such goods.[89] Such employees are to be distinguished from employees like cooks, cookees, and bull cooks in isolated lumber camps or mining camps, where the operation of a cookhouse may in fact be "closely related" and "directly essential" or, indeed, indispensable to the production of goods for commerce.[90]

Some specific examples of the application of these principles may be helpful. Such services as watching, guarding, maintaining or repairing the buildings, facilities, and equipment used in the production of goods for commerce are "directly essential" as well as "closely related" to such production as it is carried on in modern industry.[91] But such services performed with respect to private dwellings tenanted by employees of the producer, as in a mill village, would not be "directly essential" to production merely because the dwellings were owned by the producer and leased to his employees.[92] Similarly, employees of the producer or of an independent employer who are engaged only in maintaining company facilities for entertaining the employer's customers, or in providing food, refreshments, or recreational facilities, including restaurants, cafeterias, and snack bars, for the producer's employees in a factory, or in operating a children's nursery for the convenience of employees who leave young children there during working hours, would not be doing work "directly essential" to the production of goods for commerce.[93]

§ 776.19 Employees of independent employers meeting needs of producers for commerce.

(a) *General statement.* (1) If an employee of a producer of goods for commerce would not, while performing particular work, be "engaged in the production" of such goods for purposes of the act under the principles heretofore stated, an employee of an independent employer performing the same work on behalf of the producer would not be so engaged. Conversely, as shown in the paragraphs following, the fact that employees doing particular work on behalf of such a producer are employed by an independent employer rather than by the producer will not take them outside the coverage of the act if their work otherwise qualifies as the "production" of "goods" for "commerce."

(2) Of course, in view of the act's definition of "goods" as including "any part or ingredient" of goods (see § 776.20 (a), (c)), employees of an independent employer providing other employers with materials or articles which become parts or ingredients of goods produced by such other employers for commerce are actually employed by a producer of goods for commerce and their coverage under the act must be considered in the light of this fact. For example, an employee of such an independent employer who handles or in any manner works on the goods which become parts or ingredients of such other producer's goods is engaged in actual production of goods (parts of ingredients) for

---

[89] H. Mgrs. St., 1949, pp. 14, 15; see also *Brogan* v. *National Surety Co.*, 246 U.S. 257. Cf. Sen. St., 1949 Cong. Rec., p. 15372.

[90] See *Brogan* v. *National Surety Co.*, 246 U.S. 257; *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C.A. 8); cf. H. Mgrs. St., 1949, pp. 14, 15 and Sen. St., 1949 Cong. Rec., p. 15372.

[91] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372; *Kirschbaum* v. *Walling*, 316 U.S. 517; *Borden Co.* v. *Borella*, 325 U.S. 679; *Walton* v. *Southern Package Corp.* 320 U.S. 540; *Armour & Co.* v. *Wantock*, 325 U.S. 126.

[92] H. Mgrs. St., 1949, pp. 14, 15; *Morris* v. *Beaumont Mfg. Co.*, 84 F. Supp. 909 (W.D. S.C.); cf. *Wilson* v. *Reconstruction Finance Corp.*, 158 F. 2d 564 (C.A. 5), certiorari denied, 331 U.S. 810. Cf. *Brogan* v. *National Surety Co.*, 246 U.S. 257; *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C.A. 8).

[93] Cf. H. Mgrs. St., 1949, pp. 14, 15.

commerce, and the question of his coverage is determined by this fact without reference to whether his work is "closely related" and "directly essential" to the production by the other employer of the goods in which such parts or ingredients are incorporated. So also, if the employee is not engaged in the actual production of such parts or ingredients, his coverage will depend on whether as an employee of a producer of goods for commerce, his work is "closely related" and "directly essential" to the production of the parts or ingredients, rather than on the principles applicable in determining the coverage of employees of an independent employer who does not himself produce the goods for commerce.[94]

(3) Where the work of an employee would be "closely related" and "directly essential" to the production of goods for commerce if he were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer.[95] This does not necessarily mean that such work in every case will remain "closely related" to production when performed by employees of an independent employer. It will, of course, be as "directly essential" to production in the one case as in the other. (See § 776.17(c)). But in determining whether an employee's work is "closely" or only remotely related to the production of goods for commerce by an employer other than his own, the nature and purpose of the business in which he is employed and in the course of which he performs the work may sometimes become important.

Such factors may prove decisive in particular situations where the employee's work, although "directly essential" to the production of goods by someone other than his employer, is not far from the borderline between those activities which are "directly essential" and those which are not. In such a situation, it may appear that his performance of the work is so much a part of an essentially local business carried on by his employer without any intent or purpose of aiding production of goods for commerce by others that the work, as thus performed, may not reasonably be considered "closely related" to such production.[96] In other situations, however, where the degree to which the work is directly essential to production by the producer is greater the fact that the independent employer is engaged in a business having local aspects may not be sufficient to negate a close relationship between his employees' work and such production.[97] And it seems clear that where the independent employer operates a business which, unlike that of the ordinary local merchant, is directed to providing producers with materials or services directly essential to the production of their goods for commerce, the activities of such a business may be found to be "closely related" to such production.[98] In such event, all the employees of the independent employer whose work is part of his integrated effort to meet such needs of producers are covered as engaged in work closely related and directly essential to production of goods for commerce.[99]

---

[94] *Bracey* v. *Luray*, 138 F. 2d 8 (C.A. 4); *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774; *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Walling* v. *W. D. Haden Co.*, 153 F. 2d 196 (C.A. 5).

[95] See *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; H. Mgrs. St., 1949, p. 14. See also Sen. St., 1949 Cong. Rec., p. 15372.

[96] M. Mgrs. St., 1949, pp. 14, 15, *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578.

[97] H. Mgrs. St., 1949, p. 14; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88.

[98] See H. Mgrs. St., p. 14, and *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578.

[99] *Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (Stationary engineers and firemen, watchmen, elevator operators, electricians, carpenters, carpenters' helper, engaged in maintaining and servicing loft building for producers); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657 (foremen, trouble shooters, mechanics, helpers, and office employees of company selling and servicing electric motors, generators, and equipment for commercial and industrial firms); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8) (outside employees and office employees of light and power company serv-

Continued

(b) *Extent of coverage under "closely related" and "directly essential" clause illustrated.* In paragraphs (b) (1) to (5) of this section, the principles discussed above are illustrated by reference to a number of typical situations in which goods or services are provided to producers of goods for commerce by the employees of independent employers. These examples are intended not only to answer questions as to coverage in the particular situations discussed, but to provide added guideposts for determining whether employees in other situations are doing work closely related and directly essential to such production.

(1) Many local merchants sell to local customers within the same State goods which do not become a part or ingredient (as to parts or ingredients, see § 776.20(c)) of goods produced by any of such customers. Such a merchant may sell to his customers, including producers for commerce such articles, for example, as paper towels, or record books, or paper clips, or filing cabinets, or automobiles and trucks, or paint, or hardware, not specially designed for use in the production of other goods.

Where such a merchant's business is essentially local in nature, selling its goods to the usual miscellany of local customers without any particular intent or purpose of aiding production of other goods for commerce by such customers, the local merchant's employees are not doing work both "closely related" and "directly essential" to production, so as to bring them within the reach of the act, merely "because some of the customers * * * are producing goods for interstate [or foreign] commerce."[1] Therefore, if they do not otherwise engage "in commerce" (see §§ 776.8 to 776.13) or in the "production" of goods for commerce, they are not covered by the act.

In such a situation, moreover, even where the work done by the employees is "directly essential" to such production by their employer's customers, it may not meet the "closely related" test. But the more directly essential to the production of goods for commerce such work is, the more likely it is that a close and immediate tie between it and such production exists which will be sufficient, notwithstanding the local aspect of the employer's business, to bring the employees within the coverage of the act on the ground that their work is "closely related" as well as "directly essential" to production by the employer's customers.

Such a close and immediate tie with production exists, for example, where the independent employer, through his employees, supplies producers of goods for commerce with things as directly essential to production as electric motors or machinery or machinery parts for use in producing the goods of a manufacturer, for mining operations, or for production of oil, or for other production operations or the power, water, or fuel required in sucn production operations, to mention a few typical examples.[2] The fact that these needs of producers are supplied through the agency of businesses

---

ing producers); *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La.) (guards, watchmen, and office employees of company providing patrol service for producers); *Walling* v. *Thompson*, 65 F. Supp. 686 (S.D. Cal.) (installation and service men, shopmen, bookkeeper, salesman, dispatcher of company supplying burglar alarm service to producers).

In H. Mgrs. St., 1949, p. 14 it is said, "Employees engaged in such maintenance, custodial and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce."

[1] H. Mgrs. St., 1949, pp. 14, 15.

[2] See H. Mgrs. St., 1949, p. 14; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); *Walling* v. *Hammer*, 64 F. Supp. 690 (W.D. Va.); *Holland* v. *Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N.H.); *Princeton Mining Co.* v. *Veach*, 63 N.E. 2d 306 (Ind. App.).

having certain local aspects cannot alter the obvious fact that the employees of such businesses who supply these needs are doing work both "closely related" and "directly essential" to production by the employer's customers. As the United States Supreme Court has stated: "Such sales and services must be immediately available to * * * [the customers] or their production will stop."[3]

It should be noted that employees of independent employers providing such essential goods and services to producers will not be removed from coverage because an unsegregated portion of their work is performed for customers other than producers of goods for commerce. For example, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, mining, or otherwise producing goods for commerce, are subject to the act notwithstanding such gas, electricity or water is also furnished to consumers who do not produce goods for commerce.[4]

(2) On similar principles, employees of independent employers providing to manufacturers, mining companies, or other producers such goods used in their production of goods for commerce as tools and dies, patterns, designs, or blueprints are engaged in work "closely related" as well as "directly essential" to the production of the goods for commerce;[5] the same is true of employees of an independent employer engaged in such work as producing and supplying to a steel mill, sand meeting the mill's specifications for cast shed, core, and molding sands used in the production by the mill of steel for commerce.[6] Another illustration of such covered work, according to managers of the bill in Congress, is that of employees of industrial laundry and linen supply companies serving the needs of customers engaged in manufacturing or mining goods for commerce.[7]

On the other hand, the legislative history makes it clear that employees of a "local architectural firm" are not brought within the coverage of the act by reason of the fact that their activities "include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce." Such activities are not "directly essential" enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a "local" firm.[8] Of course, this result is even more apparent where the activities of the employees of such a "local" business may not be viewed as "directly essential" to production. It is clear, for example, that Congress did not believe "employees of an independently owned and operated restaurant" should be brought under the coverage of the act because the restaurant is "located in a factory." To establish coverage on "production" grounds, an employee must be "shown to have a closer and more direct relationship to the producing * * * activity" than this.[9]

(3) Some further examples may help to clarify the line to be drawn in such cases. The work of employees constructing a dike to prevent the flooding of an oil field producing oil for commerce would clearly be work not only "directly essential" but also "closely related" to the production of the oil. However, employees of a ma-

---

[3] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 664.

[4] *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); H. Mgrs. St., 1949, p. 14. For another illustration see H. Mgrs. St., 1949, p. 26, with reference to industrial laundries.

[5] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

[6] *Walling* v. *Amidon*, 153 F. 2d 159 (C.A. 10); Sen. St., 95 Cong. Rec., October 19, 1949, at 15372.

[7] H. Mgrs. St., 1949, p. 26; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372. See also *Koerner* v. *Associated Linen Laundry Suppliers*, 270 App. Div. 986, 62 N.Y.S. 2d 774.

[8] H. Mgrs. St., 1949, p. 15. See also *McComb* v. *Turpin*, 81 F. Supp. 86, 1948 (D. Md.).

[9] H. Mgrs. St., 1949, p. 14. Cf. *Bayer* v. *Courtemanche*, 76 F. Supp. 193 (D. Conn.). See also § 776.18(b).

terialman quarrying, processing, and transporting stone to the construction site for use in the dike would be doing work too far removed from production of the oil to be considered "closely related" thereto.[10] Similarly, the sale of sawmill equipment to a producer of mine props which are in turn sold to mines within the same State producing coal for commerce is too remote from production of the coal to be considered "closely related" thereto, but production of the mine props, like the manufacture of tools, dies, or machinery for use in producing goods for commerce, has such a close and immediate tie with production of the goods for commerce that it meets the "closely related" (as well as the "directly essential") test.[11]

(4) A further illustration of the distinction between work that is, and work that is not, "closely related" to the production of goods for commerce may be found in situations involving activities which are directly essential to the production by farmers of farm products which are shipped in commerce. Employees of an employer furnishing to such farmers, within the same State, water for the irrigation of their crops, power for use in their agricultural production for commerce, or seed from which the crops grow, are engaged in work "closely related" as well as "directly essential" to the production of goods for commerce.[12] On the other hand, it is apparent from the legislative history that Congress did not regard, as "closely related" to the production of farm products for commerce, the activities of employees in a local fertilizer plant producing fertilizer for use by farmers within the same State to improve the productivity of the land used in growing such products.[13] Fertilizer is ordinarily thought to be assimilated by the soil rather than by the crop and, in the ordinary case, may be considered less directly essential to production of farm products than the water or seed, without which such production would not be possible. Probably the withdrawal from coverage of such employees (who were held "necessary" to production of goods for commerce under the act prior to the 1949 amendments[14]) rests wholly or in part on the principles stated in paragraph (a)(3) of this section and subparagraph (1) of this paragraph. Heretofore the Department has taken the position that producing or supplying feed for poultry and livestock to be used by farmers within the State in the production of poultry or cattle for commerce was covered. The case of Mitchell v. Garrard Mills[15] has reached a contrary conclusion as to a local producer of such feed in a situation where all of the feed was sold to farmers and dealers for use exclusively within the State. For the time being, and until further clarification from the courts, the Divisions will not assert the position that coverage exists under the factual situation which existed in this case.

(5) Managers of the legislation in Congress stated that all maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce perform activities that are both "closely related" and "directly essential" to the production of goods for commerce, and that the same is true of employees of an independent employer performing such maintenance, custodial, and clerical work "on behalf of" such producers.

---

[10] See *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C.A. 10) (opinion of Judge Phillips) and H. Mgrs. St., 1949, p. 15.

[11] See *Walling* v. *Hamner*, 64 F. Supp. 690 (W.D. Va.), and statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135.

[12] See *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8).

Reference should be made to section 13 (a) (6) of the act providing an exemption from the wage and hours provisions for employees employed in agriculture and for certain employees of nonprofit and sharecrop irrigation companies.

[13] H. Mgrs. St. 1949, p. 15.

[14] *McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824 (C.A. 1).

[15] 241 F. 2d 249 (C.A. 6).

Typical of the employees in this covered group are those repairing or maintaining the machinery or buildings used by the producer in his production of goods for commerce and employees of a watchman or guard or patrol or burglar alarm service protecting the producer's premises.[16] On the other hand, the House managers of the bill made it clear that employees engaged in cleaning windows or cutting grass at the plant of a producer of goods for commerce were not intended to be included as employees doing work "closely related" to production on "on behalf of" the producer where they were employed by a "local window-cleaning company" or a "local independent nursery concern," merely because the customers of the employer happen to include producers of goods for commerce.[17] A similar view was expressed with respect to employees of a "local exterminator service firm" working wholly within the State exterminating pests in private homes, in a variety of local establishments, "and also in buildings within the State used to produce goods for interstate commerce." [17]

[15 FR 2925, May 17, 1950, as amended at 22 FR 9692, Dec. 4,1957]

§ 776.20 "Goods."

(a) *The statutory provision.* An employee is covered by the wage and hours provisions of the act if he is engaged in the "production" (as explained in §§ 776.15 through 776.19) "for commerce" (as explained in § 776.21) of anything defined as "goods" in section 3(i) of the act. This definition is:

> "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(b) *"Articles or subjects of commerce of any character."* It will be observed that "goods" as defined in the act are not limited to commercial goods or articles of trade, or, indeed, to tangible property, but include "articles or subjects of commerce of *any character* (emphasis supplied).[18] It is well settled that things such as "ideas, * * * orders, and intelligence" are "subjects of commerce." Telegraphic messages have, accordingly, been held to be "goods" within the meaning of the act.[19] Other articles or subjects of commerce which fall within the definition of "goods" include written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements;[20] written reports, fiscal and other statements and accounts, correspondence, lawyers' briefs and other documents;[21] advertising, motion picture, newspaper and radio copy, artwork and manuscripts for publication;[22] sample books;[23] letterheads, envelopes, shipping tags, labels, check books, blank books, book covers, advertising circulars and candy wrappers.[24] Insurance policies are "goods" within the meaning of the act;[25] so are bonds, stocks, bills of exchange, bills of lading, checks, drafts, negotiable notes and other commercial paper.[26] "Goods" includes gold;[27] livestock;[28] poultry and eggs;[29] vessels;[30] vehicles;[31] aircraft;[32] garments being laundered or rented;[33] ice;[34] containers, as, for example, cigar boxes or wrapping paper and packing materials for other goods shipped in commerce;[35] electrical energy or power, gas, etc.;[36] and by-products,[37] to mention only a few illustrations of the articles or subjects of "trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof" which the act refers to as "goods." The act's definitions do not, however, include as "goods" such things as dams, river improvements, highways and viaducts, or railroad lines.[38]

---

[16] See H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5); *Holland* v. *Amoskeag Machine Co.*, 44 F. Supp. 884 (D.N.H.).

[17] H. Mgrs. St., 1949, page 15.

[18] As pointed out in *Lenroot* v. *Western Union Tel. Co.*, 141 F. 2d 400 (C.A. 2), the legislative history shows that the definition was originally narrower, and that subjects of commerce were added by a Senate amendment.

[19] *Western Union Tel. Co.* v. *Lenroot* 323 U.S. 490.

[20] *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Yunker* v. *Abbye Employment Agency*, 32 N.Y.S. 2d 715; *Berry* v. *34 Irving Place Corp.*, 52 F. Supp. 875 (S.D. N.Y.); *Ullo* v. *Smith*, 62 F. Supp. 757, affirmed in 177 F. 2d 101 (C.A. 2); see also opinion of the four dissenting justices in *10 E. 40th St. Bldg.* v. *Callus*, 325 U.S. at p. 586.

Waste paper collected for shipment in commerce is goods. See *Fleming* v. *Schiff*, 1 W.H. Cases 893 (D. Colo.), 15 Labor Cases (CCH) par. 60,864.

[21] *Phillips* v. *Meeker Coop. Light & Power Asso.*, 63 F. Supp. 733, affirmed in 158 F. 2d 698 (C.A. 8); *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692 (N.D. Ill.) See also *Rausch* v. *Wolf*, 72 F. Supp. 658 (N.D. Ill). There are other cases (e.g., *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3) and *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2) which suggest that such things are "goods" only when they are articles of trade. Although the Supreme Court has not settled the question, such a view appears contrary to the express statutory definitions of "goods" and "commerce".

(c) *"Any part or ingredient."* Section 3(i) draws no distinction between goods and their ingredients and in fact defines goods to mean "goods" * * * or any part or ingredient thereof." The fact that goods are processed or changed in form by several employers before going into interstate or foreign commerce does not affect the character of the original product as "goods" produced for commerce. Thus, if a garment manufacturer sends goods to an independent contractor within the State to have them sewn, after which he further processes and ships them in interstate commerce, the division of the production functions between the two employees does not alter the fact that the employees of the independent contractor are actually producing ("working on") the "goods" (parts or ingredients of goods) which enter the channels of commerce.[39]

Similarly, if a manufacturer of buttons sells his products within the State to a manufacturer of shirts, who ships the shirts in interstate commerce, the employees of the button manufacturer would be engaged in the production of goods for commerce; or, if a lumber manufacturer sells his lumber locally to a furniture manufacturer who sells furniture in interstate commerce, the employees of the lumber manufacturer would likewise come within the scope of the act. Any employee who is engaged in the "production" (as explained in § 776.15) of any part or ingredient of goods produced for trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof is engaged in the production of "goods" for commerce within the meaning of the act.[40]

---

[22] *Robert* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2); *Baldwin* v. *Emigrant Industrial Sav. Bank*, 150 F. 2d 524 (C.A. 2), certiorari denied 326 U.S. 757; *Bittner* v. *Chicago Daily News Ptg. Co.*, 4 W.H. Cases 837 (N.D. Ill.), 29 Labor Cases (CCH) par. 62,479; *Schinck* v. *386 Fourth Ave. Corp.*, 49 N.Y.S. 2d 872.

[23] *Walling* v. *Higgins*, 47 F. Supp. 856 (E.D. Pa.).

[24] *McAdams* v. *Connelly*, 8 W.H. Cases 498 (W.D. Ark.), 16 Labor Cases (CCH) par. 64,963; *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo.); *Tobin* v. *Grant* 8 W.H. Cases 361 (N.D. Calif.). See also *Walling* v. *Sieving*, 5 W.H. Cases 1009 (N.D. Ill.), 11 Labor Cases (CCH) par. 63,098.

[25] *Darr* v. *Mutual Life Ins. Co.*, 169 F. 2d 262 (C.A. 2), certiorari denied 335 U.S. 871.

[26] *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2).

[27] *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C.A. 4); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C.A. 9).

[28] *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8).

[29] *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn).

[30] *Slover* v. *Wathen*, 140 F. 2d 258 (C.A. 4).

[31] *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C.A. 8).

[32] *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D. Minn.).

[33] *Phillips* v. *Star Overall Dry Cleaning Laundry Co.*, 149 F. 2d 416 (C.A. 2).

[34] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4); *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5).

[35] *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (C.A. 5), certiorari denied, 316 U.S. 704; *Fleming* v. *Schiff*, 1 W.H. Cases 883 (D. Colo.), 5 Labor Cases (CCH) par. 60,864.

[36] *Walling* v. *Connecticut Co.*; 62 F. Supp. 733 (D. Conn.), affirmed 154 F. 2d 552 (C.A. 2).

[37] *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774.

[38] *Engebretsen* v. *Albrecht*, 150 F. 2d 602 (C.A. 7); *Kenny* v. *Wigton-Abbott Corp.*, 80 F. Supp. 489 (D. N.J.).

[39] *Schulte Co.* v. *Gangi*, 328 U.S. 108.

(d) *Effect of the exclusionary clause.* The exclusionary clause in the definition that excepts "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof," is intended to protect ultimate consumers other than producers, manufacturers, or processors of the goods in question[41] from the "hot goods" provisions of section 15(a)(1) of the act.[42] Section 15(a)(1) makes it unlawful for any person "to transport * * * (or * * * ship * * * in commerce * * * any goods" produced in violation of the wage and hours standards established by the act. (Exceptions are made subject to specified conditions for common carriers and for certain purchasers acting in good faith reliance on written statements of compliance. See footnote 53 to § 776.15 (a).) By defining "goods" in section 3(i) so as to exclude goods after their delivery into the actual physical possession of the ultimate consumer (other than a producer, manufacturer, or processor thereof) Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15(a)(1) if he should transport "hot goods" across a State line.[43] Thus, if a person purchases a pair of shoes for himself from a retail store[44] and carries the shoes across a State line, the purchaser is not guilty of a violation of section 15(a) (1) if the shoes were produced in violation of the wage or hours provisions of the statute. But the fact that goods produced for commerce lose their character as "goods" after they come into the actual physical possession of an ultimate consumer who does not further process or work on them, does not affect their character as "goods" while they are still in the actual physical possession of the producer, manufacturer or processor who is handling or working on them with the intent or expectation that they will subsequently enter interstate or foreign commerce.[45] Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside of the State. Thus, employees engaged in building a boat for delivery to the purchaser at the boatyard are considered within the coverage of the act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe that the purchase will sail it outside the State.[46]

§ 776.21 "For" commerce.

(a) *General principles.* As has been made clear previously, where "goods" (as defined in the act) are produced "for commerce," every employee engaged in the "production" (as explained in §§ 776.15 through 776.19) of such goods (including any part or ingredient thereof) is within the general coverage of the wage and hours provisions of the act. Goods are produced for "commerce" if they are produced for "trade, commerce, transporation, transmission, or communication among the several States or between any State and any place outside thereof."[47] Goods are produced "for" such commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in such interstate or foreign commerce.[48] If such movement of the goods in commerce can be reasonably anticipated by the employer when his employees perform work defined in the act as "production" of such goods, it makes no difference whether he himself, or a subsequent owner or possessor of the goods, put the goods in interstate or foreign commerce.[49] The fact that goods do move in interstate or foreign commerce is strong evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.

---

[40] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Bracy* v. *Luray*, 138 F. 2d 8 (C.A. 4); *Walling* v. *W. J. Haden Co.*, 153 F. 2d 196 (C.A. 5); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Boiling* v. *Allison*, 4 W. H. Cases 500 (N.D. Okla.); *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C.A. 8); *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C.A. 2); *Walling* v. *Griffin Cartage Co.*, 62 F. Supp. 396, affirmed in 153 F. 2d 587 (C.A. 6); *Walling* v. *Kerr*, 47 F. Supp. 852 (E.D. Pa.).

[41] *Southern Advance Bag & Paper Co.* v. *United States*, 183 F. 2d 449 (C.A. 5); *Phillips* v. *Star Overall Dry Cleaning Laundry Co.* 149 F. 2d 485 (C.A. 2), certiorari denied 327 U.S. 780.

[42] *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501.

[43] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634.

[44] Note that the retail or service establishment exemption in section 13(a)(2) does not protect the retail store from a violation of the "hot goods" provision if it sells in interstate commerce goods produced in violation of section 6 or 7.

[45] See cases cited above in footnotes 41, 42, 43, this section.

[46] *Walling* v. *Lowe*, 5 W.H. Cases (S.D. Fla.), 10 Labor Cases (CCH) 63,033. See also *Walling* v. *Armbruster*, 51 F. Supp. 166 (W.D. Ark.); *Joshua Hendy Corp.* v. *Mills*, 169 F. 2d 898 (C.A. 9); *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012 S. (C.A. 5).

Although it is generally well understood that goods are produced "for" commerce if they are produced for movement in commerce to points outside the State, questions have been raised as to whether work done on goods may constitute production "for" commerce even though the goods do not ultimately leave the State. As is explained more fully in the paragraphs following, there are certain situations in which this may be true, either under the principles above stated (see paragraph (c) of this section), or because it appears that the goods are produced "for" commerce in the sense that they are produced for use directly in the furtherance, within the particular State, of the actual movement to, from, or across such State or interstate or foreign commerce. (See paragraph (b) of this section).

(b) *Goods produced for direct furtherance of interstate movement.* (1) The act's definition of "commerce," as has been seen, describes a movement, among the several States or between any State and any outside place, of trade, commerce, transportation, transmission, or communication." Whenever goods are produced "for" such movement, such goods are produced "for commerce," whether or not there is any expectation or reason to anticipate that the particular goods will leave the State.[50]

(2) The courts have held that particular goods are produced "for" commerce when they are produced with a view to their use, whether within or without the State, in the direct furtherance of the movement of interstate or foreign commerce. Thus, it is well settled that ice is produced "for" commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually moves, even though the particular ice may melt before the equipment in which it is placed leaves the State.[51] The goods (ice) produced for such use "enter into the very means of transportation by which the burdens of traffic are borne."[52] The same may be said of electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports to guide interstate traffic, lighting and operating radio stations transmitting programs interstate, and lighting and message transmission of telephone and telegraph companies.[53] Sim-

---

[47] Fair Labor Standards Act, section 3(b).

[48] *United States* v. *Darby*, 312 U.S. 100; *Warren-Bradshaw Drilling Co.* v. *Hall*, 371 U.S. 88; *Schulte Co.* v. *Gangi*, 328 U.S. 108.

[49] *Schulte Co.* v. *Gangi*, 328 U.S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall*, 417 U.S. 88. See paragraph (d) of this section.

[50] *Fleming* v. *Atlantic Co.*, 40 F. Supp. 654, affirmed in 131 F. 2d 518 (C.A. 5).

[51] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5); *Chapman* v. *Home Ice Co.*; 136 F. 2d 353 (C.A. 6) certiorari denied 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); *Hansen* v. *Salinas Valley Ice Co.*, 62 Cal. App. 357, 144 F. 2d 896.

[52] *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4).

[53] *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); see also *Walling* v. *Connecticut Co.*, 154 F. 2d 552 (C.A. 2).

ilar principles would apply to the production of fuel or water for use in the operation of railroads with which interstate and foreign commerce is carried on; the production of radio or television scripts which provide the basis for programs transmitted interstate; the production of telephone and telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems; the production of crushed rock, ready-mixed concrete, cross-ties, concrete culvert pipe, bridge timbers, and similar items for use in the necessary repair, maintenance, or improvement of railroad roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves.

Similarly, in the case of highways, pipe lines, and waterways which serve as instrumentalities of interstate and foreign commerce, the production of goods for use in the direct furtherance of the movement of commerce thereon would be the production of goods "for commerce." The production of materials[54] for use in the necessary maintenance, repair, or improvement of the instrumentality so that the flow of commerce will not be impeded or impaired is an example of this. Thus, stone or ready-mixed concrete, crushed rock, sand, gravel, and similar materials for bridges or dams; like materials or bituminous aggregate or oil for road surfacing; concrete or galvanized pipe for road drainage; bridge planks and timbers; paving blocks; and other such materials may be produced "for" commerce even though they do not leave the State.

(3) This does not, however, necessarily mean that the production of such materials within a State is always production "for" commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually "for" commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

On the one hand, there are situations where there is little room for doubt that the goods are produced "for" commerce in the sense that the goods are intended for the direct furtherance of the movement of commerce over the instrumentalities of transportation and communication. The most obvious illustration is that of special-purpose goods such as cross-ties for railroads, telephone or telegraph poles, or concrete pipe designed for highway use. Another illustration is sand and gravel for highway repair or reconstruction which is produced from a borrow pit opened expressly for that purpose, or from the pits of an employer whose business operations are conducted wholly or in the substantial part with the intent or purpose of filling highway contracts. (The fact that a substantial portion of the employer's gross income is derived from supplying such materials for highway repair and reconstruction would be one indication that a substantial part of his business is directed to the purpose of meeting such needs of commerce.)

On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced "for" commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods "for" commerce. This is, rather, a typically local activity of the kind the act was not intended to cover.

---

[54] *Walling* v. *Staffen*, 5 W.H. Cases 1002 (W.D. N.Y.), 11 Labor Cases (CCH) par. 63, 102; *McCombs* v. *Carter*, 8 W.H. Cases 498 (E.D. Va.), 16 Labor Cases (CCH) par. 64, 964. *Contra*, *McComb* v. *Trimmer*, 85 F. Supp. 565 (D. N.J.). Cf. *Engebretson* v. *Albrecht*, 150 F. 2d 602 (C.A. 7).

The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods "for" commerce.

Other illustrations might be given but these should emphasize the essential distinction which must be kept in mind. Borderline cases will, of course, arise. In each such case the the facts must be examined and a determination made as to whether or not the goods may fairly be viewed as produced "for" use in the direct furtherance of the movement of interstate or foreign commerce, and thus "for" commerce.

(c) *Controlling effect of facts at time "production" occurs.* (1) Whether employees are engaged in the production of goods "for" commerce depends upon circumstances as they exist at the time the goods are being produced, not upon some subsequent event. Thus, if a lumber manufacturer produces lumber to fill an out-of-State order, the employees working on the lumber are engaged in the production of goods for commerce and within the coverage of the act's wage and hours provisions, even though the lumber does not ultimately leave the State because it is destroyed by fire before it can be shipped. Similarly, employees drilling for oil which the employer expects to leave the State either as crude oil or refined products are engaged in the production of goods for commerce while the drilling operations are going on and are entitled to be paid on that basis notwithstanding some of the wells drilled may eventually prove to be dry holes.[55]

(2) On the other hand, if the lumber manufacturer first mentioned produces lumber to fill the order of a local contractor in the expectation that it will be used to build a schoolhouse within the State, the employees producing the lumber are not engaged in the production of goods "for" commerce and are not covered by the act. This would remain true notwithstanding the contractor subsequently goes bankrupt and the lumber is sold to a purchaser who moves it to another State; the status of the employees for purposes of coverage cannot in this situation, any more than in the others, be retroactively changed by the subsequent event.

(d) *Goods disposed of locally to persons who place them in commerce.* It is important to remember that if, at the time when employees engage in activities which constitute "production of goods" within the meaning of the act, their employer intends, hopes, expects, or has reason to believe that such goods will be taken or sent out of the State by a subsequent purchaser or other person into whose possession the goods will come, this is sufficient to establish that such employees are engaged in the production of such goods "for" commerce and covered by the act. Whether the producer passes title to the goods to another within the State is immaterial.[56] The goods are produced "for" commerce in such a situation whether they are purchased f.o.b. the factory and are taken out of the State by the purchaser, or whether they are sold within the State to a wholesaler or retailer or manufacturer or processor who in turn sells them, either in the same form or after further processing, in interstate or foreign commerce. The same is true where the goods worked on by the producer's employees are not owned by the producer and are returned, after the work is done, to the possession of the owner who takes or sends them out of the State.[57] Similarly, employees are engaged in the production of goods "for" commerce when they are manufacturing, handling, working on, or otherwise engaging in the production of boxes, barrels, bagging, crates, bottles, or other containers, wrapping or packing material which their employer has reason to believe will be used to hold the goods of other producers which will be sent out of the State in such containers or wrappings. It makes no difference that such other producers are located in the same State and that the containers are sold and delivered to them there.[58]

---

[55] *Culver v. Bell & Loffland*, 146 F. 2d 29 (C.A. 9), see also *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88.

[56] *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634 *Bracey v. Luray*, 138 F. 2d 8 (C.A. 4).

[57] *Schulte Co. v. Gangi*, 328 U.S. 108; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88; *Walling v. Kerr*, 47 F. Supp. 852 (E.D. Pa.).

Subpart B—Construction Industry

SOURCE: 21 FR 5439, July 20, 1956, unless otherwise noted.

§ 776.22 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of the traditional general coverage of employees employed in activities of the character performed in the construction industry, which depends on whether such employees are, individually, "engaged in commerce or in the production of goods for commerce" within the meaning of the Act. The 1961 and 1966 amendments broadened coverage by extending it to other employees of the construction industry on an "enterprise" basis, as explained in § 776.22a. Employees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in an enterprise engaged in covered construction as defined in the amendments.

[35 FR 5543, Apr. 3, 1970]

ENTERPRISE COVERAGE

§ 776.22a Extension of coverage to employment in certain enterprises.

Whether or not individually covered on the traditional basis, an employee is covered on an "enterprise" basis by the Act as amended in 1961 and 1966 if he is "employed in an enterprise engaged in commerce or in the production of goods for commerce" as defined in section 3 (r), (s), of the Act. "Enterprise" is defined generally by section 3(r) to mean "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units." If an "enterprise" as thus defined is an "enterprise engaged in commerce or in the production of goods for commerce" as defined and described in section 3(s) of the Act as amended, any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged "in commerce or in the production of goods for commerce", unless specifically exempt. Section 3(s), insofar as pertinent to the construction industry, reads as follows:

> Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—
>
> * * * * *
>
> (3) is engaged in the business of construction or reconstruction, or both.

Questions of "enterprise coverage" in the construction industry which are not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, D.C. 20210, or

---

[58] *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (C.A. 5), certiorari denied 316 U.S. 704; *Dize* v. *Maddrix*, 144 F. 2d 584 (C.A. 4), affirmed 324 U.S. 697; *Walling* v. *Burch*, 5 W. H. Cases 323 (S.D. Ga.); 9 Labor Cases (CCH) par. 62, 613; *Fleming* v. *Schiff*, 1 W.H. Cases 893 (D. Colo.), 5 Labor Cases (CCH) par. 60, 864.

It should be noted that where empty containers are purchased, loaded, or transported within a single State as a part of their movement, as empty containers, out of the State, an employee engaged in such purchasing, loading, or transporting operations is covered by the act as engaged "in commerce." *Atlantic Co.* v. *Weaver*, 150 F. 2d 843 (C.A. 4); *Klotz* v. *Ippolito*, 40 F. Supp. 422 (S.D. Tex.); *Orange Crush Bottling Co.* v. *Tuggle*, 70 Ga. App. 144, 27 S.E. 2d 769.

BEST DOCUMENT AVAILABLE

assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

§ 776.22b Guiding principles.

(a) *Scope of bulletin and general coverage statement.* This subpart contains the opinions of the Administrator of the Wage and Hour Division with respect to the applicability of the Fair Labor Standards Act to employees engaged in the building and construction industry. The provisions of the act expressly make its application dependent on the character of an employee's activities, that is, on whether he is engaged "in commerce" or in the "production of goods for commerce including any closely related process or occupation directly essential to such production." Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula. The United States Supreme Court has said of both phases that coverage must be given "a liberal construction" determined "by practical considerations, not by technical conceptions."[1] The Court has specifically rejected the technical "new construction" concept, as a reliable test for determining coverage under this act.[2]

So far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of "in commerce" coverage in substantially similar language as they have used in construing the "production" phase of coverage. Thus the act applies to construction work which is so intimately related to the functioning of interstate commerce as to be, in practical effect, a part of it, as well as to construction work which has a close and immediate tie with the process of production.[3]

(b) *Engagement in commerce.* The United States Supreme Court has held that the "in commerce" phase of coverage extends "throughout the farthest reaches of the channels of interstate commerce," and covers not only construction work physically in or on a channel or instrumentality of interstate commerce but also construction work "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."[4]

(c) *Production of goods for commerce.* The "production" phase of coverage includes "any closely related process or occupation directly essential" to production of goods for commerce. An employee need not be engaged in activities indispensable to production in order to be covered. Conversely, even indispensable or essential activities, in the sense of being included in the long line of causation which ultimately results in production of finished goods, may not be covered. The work must be both closely related and directly essential to the covered production.[5]

(d) *State and national authority.* Consideration must also be given to the relationship between state and national authority because Congress intended "to leave local business to the protection of the State."[6] Activities which superficially appear to be local in character, when isolated, may in fact have the required close or intimate relationship with the area of commerce to which the act applies. The courts have stated that a project should be viewed as a whole in a realistic way and not broken down into its various phases so as to defeat the purposes of the act.[7]

---

[1] *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13.

[2] *Mitchell* v. *Vollmer & Co.*, ante.

[3] *Mitchell* v. *Vollmer & Co.*, ante; Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126.

[4] *Mitchell* v. *Vollmer & Co.*, ante; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125.

[5] *Armour & Co.* v. *Wantock*, ante; *Kirschbaum* v. *Walling*, 316 U.S. 417; Cf. *10 E. 40th St. Co.* v. *Callus*, 325 U.S. 578.

[6] *Walling* v. *Jacksonville Paper Co.*, ante; *Kirschbaum* v. *Walling*, ante; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497.

[7] *Walling* v. *Jacksonville Paper Co.*, ante; *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286

Continued

BEST DOCUMENT AVAILABLE

(e) *Interpretations.* In his task of distinguishing covered from non-covered employees the Administrator will be guided by authoritative court decisions. To the extent that prior administrative rulings, interpretations, practices and enforcement policies relating to employees in the construction industry are inconsistent or in conflict with the principles stated in this subpart, they are hereby rescinded and withdrawn.

[21 FR 5439, July 20, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

§ 776.23 Employment in the construction industry.

(a) *In general.* The same principles for determining coverage under the Fair Labor Standards Act generally apply to employees in the building and construction industry. As in other situations, it is the employee's activities rather than the employer's business which is the important consideration, and it is immaterial if the employer is an independent contractor who performs the construction work for or on behalf of a firm which is engaged in interstate commerce or in the production of goods for such commerce.[8]

(b) *On both covered and non-covered work.* If the employee is engaged in both covered and non-covered work during the workweek he is entitled to the benefits of the act for the entire week regardless of the amount of covered activities which are involved. The covered activities must, however, be regular or recurring rather than isolated, sporadic or occasional.[9]

(c) *On covered construction projects.* All employees who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of interstate commerce or facilities for the production of goods for such commerce are within the scope of the act. Closely or intimately related construction work includes the maintenance, repair, reconstruction, redesigning, improvement, replacement, enlargement or extension of a covered facility.[10] If the construction project is subject to the act, all employees who participate in the integrated effort are covered, including not only those who are engaged in work at the site of the construction such as mechanics, laborers, handymen, truckdrivers, watchmen, guards, timekeepers, inspectors, checkers, surveyors, payroll workers, and repair men, but also office, clerical, bookkeeping, auditing, promotional, drafting, engineering, custodial and stock room employees.[11]

(d) *On non-covered construction projects.* (1) A construction project maybe purely local and, therefore, not covered, but some individual employees may nonetheless be covered on independent ground by reason of their interstate activities. Under the principle that coverage depends upon the particular activities of the employee and not on the nature of the business of the employer, individual employees engaged in interstate activities are covered even though their activities may be performed in connection with a non-covered construction project. Thus, the act is applicable to employees who are regularly engaged in ordering or procuring materials and equipment from outside the State or receiving, unloading, checking, watch-

---

(C.A.4); *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A. 10), certiorari denied 345 U.S. 915; See General Coverage Bulletin, §§ 776.19 (a), (b), and 776.21(b).

[8] *Mitchell* v. *Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918; *Fleming* v. *Sondeck*, 132 F. (2d) 77 (C.A. 5), certiorari denied 318 U.S. 772; *Kirschbaum* v. *Walling*, ante; *Walling* v. *McCrady Construction Co.*, 156 F. (2d) 932. certiorari denied 329 U.S. 785; *Mitchell* v. *Brown Engineering Co.*, 224 F. (2d) 359 (C.A. 8), certiorari denied 350 U.S. 875; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, decided June 5, 1965 (C.A. 8).

[9] See General Coverage Bulletin, §§ 776.2 and 776.4

[10] *Walling* v. *McCrady Const. Co.*, 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, decided June 5, 1956 (C.A. 8); *Tobin* v. *Pennington-Winter Const. Co.* ante; *Mitchell* v. *Vollmer & Co.*, ante.

[11] *Mitchell* v. *Brown Engineering Co.*, ante; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell*, ante; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334 (C.A. 9).

ing or guarding such goods while they are still in transit. For example, laborers on a non-covered construction project who regularly unload materials and equipment from vehicles or railroad cars which are transporting such articles from other States are performing covered work.[12]

(2) Similarly, employees who regularly use instrumentalities of commerce, such as the telephone, telegraph and mails for interstate communication are within the scope of the act, as are employees who are regularly engaged in preparing, handling, or otherwise working on goods which will be sent to other States. This includes the preparation of plans, orders, estimates, accounts, reports and letters for interstate transmittal.

§ 776.24 Travel in connection with construction projects.

The act also applies to employees who regularly travel across State lines in the performance of their duties, even though the construction project itself is not covered.[13] If an employee regularly transports persons, materials, or equipment between jobs across State lines, or to a covered project, even within the State, as part of his duties for the contractor, he would be covered. As in other situations, the act would not apply if crossing State lines or transporting persons, materials or equipment by the employee was isolated or sporadic rather than regular and recurring. Also, ordinary home-to-work travel, even across State lines, is not covered.

§ 776.25 Regular and recurring activities as basis of coverage.

Regular and recurring may mean a very small amount and is not to be determined by volume or percentages. Coverage depends on the character rather than the volume of the employee's activities. For example, if an employee in the course of his duties regularly engages in covered work even though the covered work constitutes only a small part of his duties, he would be covered in any week when he performs such covered work.[14]

§ 776.26 Relationship of the construction work to the covered facility.

Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce or the engagement in commerce. For this reason the erection, maintenance or repair of dwellings, apartments, hotels, churches and schools are not covered projects.[15] Similarly the construction of a separate, wholly new, factory building, not constructed as an integral part or as an improvement of an existing covered production plant, is not covered (Cf. § 776.27(c)). Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is "new construction" nor the fact that it is physically separated from an existing covered plant, is determinative. Moreover, the court decisions make it clear that the construction project itself need not be actually employed in commerce or in the production of goods for commerce during the time of its construction in order to be covered.[16] Such factors may be considered in determining whether as a practical matter the work is directly and vitally related to the functioning of the covered facility but would not be decisive.

---

[12] *Clyde* v. *Broderick*, 144 F. (2d) 348 (C.A. 10); *Durnil* v. *J. E. Dunn Construction Co.* 186 F (2d) 27 (C.A. 8), *Donahue* v. *George A. Fuller Co.*, 104 F. Supp. 145; Cf. *Mitchell* v. *Royal Baking* Co., 219 F. (2d) 532 (C.A. 5).

[13] *Reck* v. *Zarmacay*, 264 App. Div. 520, 36 N.Y.S. (2d) 394; *Colbeck* v. *Dairyland Creamery Co.*, 17 N.W. (2d) 262 (S. Ct. S.D.).

[14] *Walling* v. *Jacksonville Paper Co.*, ante; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178.

[15] Cf. § 776.18(b).

[16] *Mitchell* v. *Vollmer*, ante; *Bennett* v. *V. P. Loftis Co.*, ante; *Mitchell* v. *Chambers Const. Co.*, 214 F. (2d) 515 (C.A. 10); *Walling* v. *McCrady Const. Co.*, ante; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334 (C.A. 5), certiorari denied, 345 U.S. 915.

§ 776.27 Construction which is related to covered production.

(a) *Existing production establishments.* (1) Covered production facilities within the concept of the act include mines, oil wells, banks, manufacturing, packing and processing plants, filtration, sewage treatment, electric power and water plants, shipyards, warehouses in which goods are broken down, packed or handled preparatory to being sent in interstate commerce, and similar establishments.

(2) The repair or maintenance of a covered production unit is essential for its continued operation and has a close and immediate tie with the production of goods for commerce.[17] The act is also applicable to other construction which is an integral part of a covered production unit, such as the replacement, enlargement, reconstruction, extension or other improvement of the premises, the buildings, the machinery, tools and dies and other equipment. Functionally such work is like maintenance and repair and is necessary for the continued, efficient and effective operation of the facility as a unit. Thus the construction of new appurtenances of a covered production establishment such as parking aprons, access roads, railroad spurs, drainage ditches, storm, waste and sanitary sewers or adjacent integrated buildings is subject to the act. Similarly, the act applies to the installation of telephone, electric, gas and water lines, machinery and other equipment on the premises of such a facility.

(3) On the other hand, the production and furnishings, within the State, of construction materials, such as sand, gravel, brick and other construction materials produced for general local use, is not covered even if the producer also supplies such materials to construction companies which use them within the State in the repair, maintenance or improvement of facilities for the production of goods for commerce. Employees of the materialman in such a situation would not have such a close and immediate tie to the production of goods for commerce as to be considered "closely related" and "directly essential" to such production.[18]

(b) *Utilities which serve production establishments.* The act applies to employees of public utilities which furnish gas, electricity, water or fuel to firms engaged within the same State in manufacturing, processing, producing, or mining goods for commerce.[19] Construction work performed upon the plant and facilities of such a utility is covered as in the case of any other covered production establishment.[20] The extension of the lines or other facilities of a covered utility for the first time to the premises of an establishment which produces goods for commerce would be subject to the act, because such extension is simply an improvement or enlargement of an existing covered utility.[21] Furthermore, the maintenance or repair of the wires, pipes, or other conduits of a covered utility which serves business and manufacturing as well as residential areas would also be within the act. On the other hand, extension or repair of lines or other facilities serving only residential areas would not be covered unless the electricity, gas, fuel, or water comes from out of the State.

(c) *New construction which is not integrated with existing production facilities.* (1) Construction of a new factory building, even though its use for interstate production upon completion may be contemplated, will not ordinarily be considered covered. However, if the new building is designed as a replacement of or an addition or an improvement to, an existing interstate production facility, its construction will be considered subject to the act.

---

[17] *Kirschbaum Co.* v. *Walling*, ante; *Walling* v. *McCrady Const. Co.*, ante.

[18] See General Coverage Bulletin, § 776.19 (b) (3); but see § 776.19 (b) (1), (2) and (3); on coverage of furnishing materials "specially designed", or meeting particular specifications, for use in production of particular kinds of goods for commerce; and paragraph (d) of this section, on coverage of producing and furnishing materials for use in construction work on instrumentalities of commerce.

[19] House Manager's Statement, 1949 Amendments.

[20] See decisions cited in footnotes 10 and 11, of this subpart.

[21] *Meeker Cooperative Light & Power Ass'n* v. *Phillips*, 158 F. (2d) 698 (C.A. 8); Cf. *New Mexico Public Service Co.* v. *Engel*, 145 F. (2d) 636 (C.A. 10); *Lewis* v. *Florida Power & Light Co.*, 154 F. (2d) 75 (C.A. 5).

(2) If the new building, though not physically attached to an existing plant which produces goods for commerce, is designed to be an integral part of the improved, expanded or enlarged plant, the construction, like maintenance and repair, it would be subject to the act.[22]

(d) *Production of materials for use in construction work on interstate instrumentalities.* (1) The act applies to employees who are engaged, at the job site or away from it, in the production of goods to be used within the State for the maintenance, repair, extension, enlargement, improvement, replacement or reconstruction of an instrumentality of interstate commerce. The goods need not go out of the State since the act applies to the production of goods "for" commerce, including for use in commerce, and is not limited to "production of goods for transportation in commerce," that is, to be sent across State lines.[23]

(2) The act would also apply to the production of such items as electricity, fuel or water, for use in the operation of railroads or other instrumentalities of commerce.[24] Therefore, as in the case of other production units, the maintenance, repair or other improvement of the premises or buildings or the appurtenances, including the machinery, tools and dies and equipment, of the facilities which are used to produce such goods, are subject to the act.

(3) Coverage also extends to employees who produce sand, gravel, asphalt, cement, crushed rock, railroad ties, pipes, conduits, wires, concrete pilings and other materials which are to be used in the construction of instrumentalities which serve as the means for the interstate movement of goods or persons.

(4) This does not mean, however, that in every case where employees produce such materials which are used within the State in the maintenance, repair, or reconstruction of an instrumentality of commerce, the production of such materials is necessarily considered as production "for" commerce. A material supply company may be engaged in an independent business which is essentially local in nature, selling its materials to the usual miscellany of local customers without any particular intent or purpose of supplying materials for the maintenance, repair, or reconstruction of instrumentalities of commerce, and without any substantial portion of its business being directed to such specific uses. Employees of such an "essentially local business" are not covered by the act merely because as an incident to its essentially local business, the company, on occasion, happens to produce or supply some materials which are used within the State to meet the needs of instrumentalities of commerce.[25]

§ 776.28 Covered preparatory activities.

(a) *Before production begins.* (1) The United States Supreme Court has held that the act is applicable to employees of a company which was engaged in preliminary oil well drilling, even though the holes were drilled to a specified depth which was short of where the oil was expected to be found.[26] The act would also apply to drilling operations even though no oil was discovered.[27] Laborers employed in erecting drilling rigs would also be covered.[28] Other preparatory work before drilling begins in an oil field, such as staking oil claims, surveying, clearing the land, assembling materials and equipment, erecting sheds, derricks or dikes would also be within the scope of the act.[29] Preliminary work such as the foregoing has the requisite close and immediate tie with the production of goods for commerce to be within the coverage of the act.

---

[22] *Walling* v. *McCrady Const. Co.*, ante.

[23] *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13; *Tobin* v. *Johnson*, 198 F. (2d) 130 (C.A. 8); *Mitchell* v. *Emulsified Asphalt Products Co.*, 222 F. (2) 913 (C.A. 6).

[24] Sections 776.19(b)(2) and 776.21. See also paragraph (b) of this section.

[25] See §§ 776.19 (a) and (b) and 776.21 (b) (3). See also cases cited in footnote 22 of this subpart.

[26] *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88.

[27] *Culver* v. *Bell & Loffland*, 146 F. (2d) 20.

[28] *Devine* v. *Levy*, 39 F. Supp. 44.

[29] *Straughn* v. *Schlumberger Well Surveying Corp.*, 72 F. Supp. 511.

(2) Similarly, coverage extends to employees engaged in the installation of machinery to be used in covered production in a new factory building, even though the construction of the building itself may not have been subject to the act. Such installation is considered to be a preliminary production activity rather than simply part of the construction of the building.

(3) If the construction project is subject to the act, preliminary activities, such as surveying, clearing, draining and leveling the land, erecting necessary buildings to house materials and equipment, or the demolition of structures in order to begin building the covered facility, are subject to the act.[30]

(b) *Facilities used in aid of the covered construction.* The installation of facilities, and the repair and maintenance of trucks, tools, machinery and other equipment to be used by a contractor in the furtherance of his covered construction work, are activities subject to the act.

§ 776.29 Instrumentalities and channels of interstate commerce.

(a) *Typical examples.* Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for interstate communications include railroads, highways, city streets; telephone, gas, electric and pipe line systems; radio and television broadcasting facilities; rivers, canals and other waterways; airports; railroad, bus, truck or steamship terminals; freight depots, bridges, ferries, bays, harbors, docks, wharves, piers; ships, vehicles and aircraft which are regularly used in interstate commerce.[31]

(b) *General character of an instrumentality of interstate commerce.* (1) An instrumentality of interstate commerce need not stretch across State lines but may operate within a particular State as a link in a chain or system of conduits through which interstate commerce moves.[32] Obvious examples of such facilities are railroad terminals, airports which are components of a system of air transportation, bridges and canals. A facility may be used for both interstate and intrastate commerce but when it is so used it is nonetheless an interstate instrumentality. Such double use does not exclude construction employees from being engaged in commerce.

(2) The term instrumentality of interstate commerce may refer to one unit or the entire chain of facilities. An instrumentality such as a railroad constitutes a system or network of facilities by which the interstate movement of goods and persons is accomplished. Each segment of the network is integrally connected with the whole and must be viewed as part of the system as a whole, not as an isolated local unit.

(3) A construction project which changes the interstate system as a whole, or any of its units, would have a direct bearing on the flow of interstate commerce throughout the network. Thus, the new construction of an alternate route or an additional unit which alters the system or any segment of it, would have such a direct and vital relationship to the functioning of the instrumentality of interstate commerce as to be, in practical effect, a part of such commerce rather than isolated local activity. For example, such construction as the maintenance, repair, replacement, expansion, enlargement, extension, reconstruction, redesigning, or other improvement, of a railroad system as a whole, or of any part of it, would have a close and intimate relationship with the movement of goods and persons across State lines. All such construction, therefore, is subject to the act.

(4) The same would be true with respect to other systems of interstate transportation or communication such as roads, waterways, airports, pipe, gas

---

[30] Coverage of preparation of plans and designs is discussed in § 776.19(b) (2).

[31] General coverage bulletin, § 776.11.

[32] *Mitchell* v. *Vollmer*, ante; *Bennett* v. *V. P. Loftis*, 167 F. (2d) 286 (C.A. 4); *Overstreet* v. *North Shore Corp.*, ante; *Rockton & Rion R. R.* v. *Walling*, 146 F. (2d) 111, certiorari denied 324 U.S. 880; *National Labor Relations Board* v. *Central Missouri Tel. Co.*, 115 F. (2d) 563 (C.A. 8).

and electric lines, and ship, bus, truck, telephone and broadcasting facilities. Consequently, construction projects for lengthening, widening, deepening, relocating, redesigning, replacing and adding new, substitute or alternate facilities; shortening or straightening routes or lines; providing cutoffs, tunnels, trestles, causeways, overpasses, underpasses and bypasses are subject to the act. Furthermore, the fact that such construction serves another purpose as well as the improvement of the interstate facility, or that the improvement to the interstate facility was incidental to other non-covered work, would not exclude it from the act's coverage.[33]

(c) *Examples of construction projects which are subject to the act.* Coverage extends to employees who are engaged on such work as repairing or replacing abutments and superstructures on a washed out railroad bridge;[34] replacing an old highway bridge with a new one at a different location;[35] removing an old railroad bridge and partially rebuilding a new one; repairing a railroad roundhouse, signal tower, and storage building; relocating portions of a county road; erecting new bridges with new approaches in different locations from the old ones; widening a city street; relocating, improving or extending interstate telephone facilities including the addition of new conduits and new trunk lines.[36] Also within the scope of the act are employees who are engaged in the construction, maintenance and repair of ships, barges and other vessels used for interstate commerce, including those belonging to the Government,[37] and facilities used in the production and transmission of electric, fuel, water, steam and other powers to instrumentalities of interstate commerce.[38]

(d) *Construction of new facilities.* (1) In a case before the United States Supreme Court, the question was presented whether the act applied to the construction of a new canal at some distance from the one then in use. The new canal was to be an alternate route for entering the Mississippi River and would relieve traffic congestion in the existing canal. The latter would continue in operation but could not be widened because of its location in a highly developed industrial section of New Orleans. The Court in holding the construction of the new canal to be within the coverage of the act stated that the new construction was as intimately related to the improvement of navigation on the Gulf Intercoastal Waterway as dredging in the existing canal would be and that the project was "part of the redesigning of an existing facility of interstate commerce."[39] Thus the construction of a new facility in a network of instrumentalities of interstate commerce, in order to serve the system, or to function as an alternate route, or to relieve traffic congestion in another unit, or to replace an outmoded facility, is subject to the act.

(2) Similarly, the construction of a new unit, such as a new airport which is an addition to the entire interstate system of air transportation although not physically attached to any other unit, would, as a practical matter, necessarily expand, promote and facilitate the movement of interstate commerce over the airway system, and consequently, would be subject to the act. In such a situation the interstate system, although composed of physically separate local units, is, as a whole, the instrumentality of commerce which is improved. In most cases such an addition would also directly enhance, improve or replace some particular nearby unit in the in-

---

[33] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508; *Cuascut* v. *Standard Dredging Corp.*, 94 F. Supp. 197.

[34] *Pedersen* v. *J. F. Fitzgerald*, 318 U.S. 740.

[35] *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286 (C.A. 4).

[36] *Walling* v. *McCrady Const. Co.*, ante.

[37] *Divins* v. *Hazeltine Electronics Corp.*, 163 F. (2d) 100 (C.A. 2); Cf. *Walling* v. *Haile Gold Mines, Inc.*, 136 F. (2d) 102 (C.A. 4).

[38] *New Mexico Public Service Co.* v. *Engel*, ante; *Lewis* v. *Florida Light & Power Co.*, ante; *Mitchell* v. *Mercer Water Co.*, 208 F. (2d) 900 (C.A. 3); *Mitchell* v. *Brown Engineering Co.*, ante.

[39] *Mitchell* v. *Vollmer & Co.*, ante; see also *Bennett* v. *V. P. Loftis*, ante.

terstate network. The new addition would thus relieve traffic congestion and facilitate the interstate movement of commerce over the existing instrumentality as a whole, as well as at the particular nearby units. The same principle would apply to highways, turnpikes and similar systems of interstate facilities.

(3) In like manner, the reconstruction, extension or expansion of a small unit in a system of interstate facilities, such as the enlargement of a small airport which is regularly used for interstate travel or transportation, is covered, regardless of the relative sizes of the original unit and the new one. The construction in such situations facilitates and improves the interstate commerce served by, and is directly related to the continued, efficient and effective operation of, both the particular original unit and the interstate system as a whole. Also, the construction of facilities such as hangars, repair shops and the like at a covered airport, which are "directly and vitally related to the functioning" of the instrumentality of commerce, would be subject to the act.[40]

(e) *Construction on waterways.* Courts have consistently held that the engagement in interstate commerce includes the maintenance, repair or improvement of navigable waterways even when the construction work is performed on the non-navigable parts of the instrumentality such as at the headwaters and watersheds or in tributary streams.[41]

Construction which improves rivers and waterways serving as instrumentalities of interstate commerce includes dredging; the building, maintenance, repair, replacement, reconstruction, improvement, or enlargement of dikes, revetments, levees, harbor facilities, retaining walls, channels, berths, piers, wharves, canals, dams, reservoirs and similar projects; also the removal of debris and other impediments in the waterway and flood control work in general.[42]

The act applies to construction work which increases the navigability of a waterway, protects it from floods or otherwise improves or maintains its use as an instrumentality of interstate commerce. The courts have held that a program for controlling floods is inseparably related to the stabilization and maintenance of the navigable channel of the river, since levees, dams, dikes and like structures, which hold back the waters in time of flood, at the same time confine a more efficient body of water during other periods by increasing its velocity and scouring and deepening its channels.[43]

(1) *Flood control work in non-navigable parts of a waterway.* Both Congress and the courts have considered that watersheds and headwaters are keys to the control of floods on navigable streams and that the control over the non-navigable parts of a river is essential for the prevention of overflows on the navigable portions. It is also well settled that in order to control floods on a navigable stream it is necessary to take flood control measures on its tributaries.

(2) *Basis of coverage.* (i) The construction of a levee, dam or other improvement in any part of a river or its tributaries for the purpose of preventing floods or aiding navigation must be considered as an integral part of a single comprehensive project for improvement of the river system. Even though a particular levee or dike, by itself, may not effect an improvement, the courts have made it clear that the combined effect of a chain of such structures serves as the basis for determining coverage. The construction of a particular river structure may, therefore, be subject to the act simply because it is part of a comprehensive system of structures, whose combined

---

[40] *Mitchell* v. *Vollmer & Co.*, ante.

[41] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, ante; *United States* v. *Appalachian Power Co.*, 311 U.S. 426.

[42] *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. (2d) 945 (C.A. 6); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334.

[43] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Tobin* v. *Ramey*, 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor*, 346 U.S. 925; *Jackson* v. *U.S.*, 230 U.S. 1.

effect will achieve the improvement of the navigable channel. Thus, it has been held that site clearance work in the construction of a multiple-purpose dam on a non-navigable stream is covered by the act where the work is an integral part of a comprehensive system for the control of floods and the betterment of navigation on the Arkansas and Mississippi Rivers.[44] Similarly, the enlargement of a set-back levee, located from two to six miles from the banks of the Mississippi, was held to be covered because it was part of the Mississippi leveee system even though the set-back levee, when viewed separately, was not directly related to the functioning of the Mississippi as an instrumentality of commerce.[45]

(ii) The principle involved applies also to other instrumentalities of interstate commerce. As in the case of covered waterway projects, individual additions or improvements to other instrumentalities of interstate commerce may for coverage purposes be considered as part of a whole program rather than separately. The act will apply to the construction in such situations if the unit, considered by itself or as part of a larger program, promotes the efficient or effective operation of the instrumentality of interstate commerce.

(3) *Construction of wharves, piers and docks.* The act also applies to the construction of new piers, wharves, docks and other facilities if they are integrated with the interstate commerce functions of an existing harbor. Similarly, the new construction of such facilities in other locations along the waterway is subject to the act if they are regularly used by vessels carrying goods or persons in interstate commerce.

(f) *Highways, county roads and city streets*—(1) *Typical examples.* As a generic term highways includes bridges, underpasses, overpasses, bypasses, county roads, access roads, city streets and alternate roads, draw bridges, toll bridges, toll roads and turnpikes, but does not include roads or parking facilities on privately owned land and which are not for use by the general public for interstate traffic.

(2) *Basis of coverage.* The general rules for determining the coverage of employees engaged in the construction of other instrumentalities of interstate commerce apply to highway construction work. The United States Supreme Court has stated that in applying the act to highway construction as to other coverage problems, practical rather than technical constructions are decisive.[46] After the Court remanded the Overstreet case to the district court, the latter held that the employees engaged in maintaining and repairing the facilities regularly used and available for interstate commerce were engaged in commerce, regardless of the extent of the interstate traffic.[47] The court recognized that although the amount of the interstate commerce in the Overstreet case was very small it was regular and recurring and not occasional nor incidental. Thus, under the authoritative decision a percentage test is not regarded as a practical guide for ascertaining whether a particular facility is an instrumentality of interstate commerce.[48] Employees who are engaged in the repair, maintenance, extension, enlargement, replacement, reconstruction, redesigning or other improvement of such a road are subject to the act. The fact that the road is owned or controlled by the State or Federal Government or by any subdivision thereof would not affect the applicability of the Act. The same would be true if State or Federal funds were used to finance the construction. It should be noted, however, that if the employees are actually employees of a State, or a political subdivision thereof, they are excepted from coverage of the Act under section 3(d).

(3) *City streets.* The construction, reconstruction or repair of a city street, whether residential or not, which is

---

[44] *Tobin* v. *Pennington-Winter Const. Co.*, ante.

[45] *Tobin* v. *Ramey*, 205 F. (2d) 606, rehearing denied 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor*, 346 U.S. 925.

[46] *Overstreet* v. *North Shore Corp.*, ante.

[47] 52 F. Supp. 503.

[48] *North Shore Corp.* v. *Barnett*, 143 F. (2d) 172 (C.A. 5); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. (2d) 13 (C.A. 8).

part of an interstate highway or which directly connects with any interstate highway is so closely related to the interstate commerce moving on the existing highway as to be a part of it. Construction of other streets, which are not a part of a public road building program and are constructed on private property as a part of a new residential development, will not be considered covered until further clarification from the courts.

(4) *New highway construction.* Although a number of appellate court decisions have held that the construction of new highways is not within the coverage of the act, these decisions relied upon the technical "new construction" concept which the United States Supreme Court has subsequently held to be inapplicable as the basis for determining coverage under this Act.[49] Under the principles now established by that Court's decision, which require determination of coverage on the basis of realistic, practical considerations, the construction of new expressways and highways that will connect with an interstate highway system is so "related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."[50] Such highways and expressways not only are so designed as necessarily to become a part of or additions to an existing interstate highway system, but their construction is plainly of a national rather than a local character, as evidenced by the Federal financial contribution to their construction. And neither the fact that they are not dedicated to interstate use during their construction, nor the fact that they will constitute alternate routes rather than replacement of existing road, constitute sufficient basis, under the controlling court decisions, for excluding them from the coverage of the act.[51] Accordingly, unless and until authoritative court decision in the future hold otherwise, the construction of such new highways and expressways will be regarded as covered.

§ 776.30 Construction performed on temporarily idle facilities.

The act applies to work on a covered interstate instrumentality or production facility even though performed during periods of temporary non-use or idleness.[52] The courts have held the act applicable to performance of construction work upon a covered facility even though the use of the facility was temporarily interrupted or discontinued.[53] It is equally clear that the repair or maintenance of a covered facility (including its machinery, tools, dies, and other equipment) though performed during the inactive or dead season, is subject to the acts.[54]

PART 778—OVERTIME COMPENSATION

Subpart A—General Considerations

Sec.

778.0 Introductory statement.
778.1 Purpose of interpretative bulletin.
778.2 Coverage and exemptions not discussed.
778.3 Interpretations made, continued, and superseded by this part.
778.4 Reliance on interpretations.

---

[49] Compare *Mitchell* v. *Vollmer*, ante, with *Koepfle* v. *Garavaglia*, 200 F. (2d) 191 (C.A. 6); *Moss* v. *Gillioz Const. Co.*, 206 F. (2d) 819 (C.A. 10); and *Van Klaveren* v. *Killian House*, 210 F. (2d) 510 (C.A. 5). The Vollmer decision specifically rejected the applicability of the decision construing the Federal Employer's Liability Act, on which the cited appellate court decision relied.

[50] *Mitchell* v. *Vollmer*, ante; *Walling* v. *Jacksonville Paper Co.*, ante; and *Overstreet* v. *North Shore Corp.*, ante.

[51] *Mitchell* v. *Vollmer & Co.*, ante; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334, certiorari denied 345 U.S. 915; and *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286.

[52] *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Slover* v. *Wathen & Co.*, 140 F. (2d) 258 (C.A. 4); *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733; and *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C.A. 5).

[53] *Pedersen* v. *J. F. Fitzgerald Construction Co.*, ante; *Bennett* v. *V. P. Loftis*, ante; *Walling* v. *McCrady Const. Co.*, ante; and *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733.

[54] *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Bowie* v. *Gonzalez*, 117 F. (2d) 11; *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. (2d) 597, certiorari denied 328 U.S. 858; *Walling* v. *Keensburg Steamship Co.*, 462 F. (2d) 405.

Sec.
778.5 Relation to other laws generally.
778.6 Effect of Davis-Bacon Act.
778.7 Effect of Service Contract Act of 1965.

Subpart B—The Overtime Pay Requirements

INTRODUCTORY

778.100 The maximum-hours provisions.
778.101 Maximum nonovertime hours.
778.102 Application of overtime provisions generally.
778.103 The workweek as the basis for applying section 7(a).
778.104 Each workweek stands alone.
778.105 Determining the workweek.
778.106 Time of payment.

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE "REGULAR RATE"

778.107 General standard for overtime pay.
778.108 The "regular rate".
778.109 The regular rate is an hourly rate.
778.110 Hourly rate employee.
778.111 Pieceworker.
778.112 Day rates and job rates.
778.113 Salaried employees—general.
778.114 Fixed salary for fluctuating hours.
778.115 Employees working at two or more rates.
778.116 Payments other than cash.
778.117 Commission payments—general.
778.118 Commission paid on a workweek basis.
778.119 Deferred commission payments—general rules.
778.120 Deferred commission payments not identifiable as earned in particular workweeks.
778.121 Commission payments—delayed credits and debits.
778.122 Computation of overtime for commission employees on established basic rate.

Subpart C—Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

EXTRA COMPENSATION PAID FOR OVERTIME

778.201 Overtime premiums—general.
778.202 Premium pay for hours in excess of a daily or weekly standard.
778.203 Premium pay for work on Saturdays, Sundays, and other "special days".
778.204 "Clock pattern" premium pay.
778.205 Premiums for weekend and holiday work—example.
778.206 Premiums for work outside basic workday or workweek—examples.
Sec.
778.207 Other types of contract premium pay distinguished.

BONUSES

778.208 Inclusion and exclusion of bonuses in computing the "regular rate".
778.209 Method of inclusion of bonus in regular rate.
778.210 Percentage of total earnings as bonus.
778.211 Discretionary bonuses.
778.212 Gifts, Christmas and special occasion bonuses.
778.213 Profit-sharing, thrift, and savings plans.
778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.
778.215 Conditions for exclusion of benefit-plan contributions under section 7(e) (4).

PAYMENTS NOT FOR HOURS WORKED

778.216 The provisions of section 7(e) (2) of the Act.
778.217 Reimbursement for expenses.
778.218 Pay for certain idle hours.
778.219 Pay for foregoing holidays and vacations.
778.220 "Show-up" or "reporting" pay.
778.221 "Call-back" pay.
778.222 Other payments similar to "call-back" pay.
778.223 Pay for non-productive hours distinguished.
778.224 "Other similar payments".

TALENT FEES IN THE RADIO AND TELEVISION INDUSTRY

778.225 Talent fees excludable under regulations.

Subpart D—Special Problems

INTRODUCTORY

778.300 Scope of subpart.

CHANGE IN THE BEGINNING OF THE WORKWEEK

778.301 Overlapping when change of workweek is made.
778.302 Computation of overtime due for overlapping workweeks.

ADDITIONAL PAY FOR PAST PERIOD

778.303 Retroactive pay increases.

HOW DEDUCTIONS AFFECT THE REGULAR RATE

778.304 Amounts deducted from cash wages—general.
778.305 Computation where particular types of deductions are made.

BEST DOCUMENT AVAILABLE

Sec.
778.306 Salary reductions in short workweeks.
778.307 Disciplinary deductions.

LUMP SUM ATTRIBUTED TO OVERTIME

778.308 The overtime rate is an hourly rate.
778.309 Fixed sum for constant amount of overtime.
778.310 Fixed sum for varying amounts of overtime.
778.311 Flat rate for special job performed in overtime hours.

"TASK" BASIS OF PAYMENT

778.312 Pay for task without regard to actual hours.
778.313 Computing overtime pay under the Act for employees compensated on task basis.
778.314 Special situations.

EFFECT OF FAILURE TO COUNT OR PAY FOR CERTAIN WORKING HOURS

778.315 Payment for all hours worked in overtime workweek is required.
778.316 Agreements or practices in conflict with statutory requirements are ineffective.
778.317 Agreements not to pay for certain nonovertime hours.
778.318 Productive and nonproductive hours of work.

EFFECT OF PAYING FOR BUT NOT COUNTING CERTAIN HOURS

778.319 Paying for but not counting hours worked.
778.320 Hours that would not be hours worked if not paid for.

REDUCTION IN WORKWEEK SCHEDULE WITH NO CHANGE IN PAY

778.321 Decrease in hours without decrease in pay—general.
778.322 Reducing the fixed workweek for which a salary is paid.
778.323 Effect if salary is for variable workweek.
778.324 Effect on hourly rate employees.
778.325 Effect on salary covering more than 40 hours' pay.
778.326 Reduction of regular overtime workweek without reduction of take-home pay.
778.327 Temporary or sporadic reduction in schedule.
778.328 Plan for gradual permanent reduction in schedule.
778.329 Alternating workweeks of different fixed lengths.

PRIZES AS BONUSES

Sec.
778.330 Prizes or contest awards generally.
778.331 Awards for performance on the job.
778.332 Awards for activities not normally part of employee's job.
778.333 Suggestion system awards.

Subpart E—Exceptions From the Regular Rate Principles

COMPUTING OVERTIME PAY ON AN "ESTABLISHED" RATE

778.400 The provisions of section 7(g)(3) of the Act.
778.401 Regulations issued under section 7(g)(3).

GUARANTEED COMPENSATION WHICH INCLUDES OVERTIME PAY

778.402 The statutory exception provided by section 7(f) of the Act.
778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).
778.404 Purposes of exemption.
778.405 What types of employees are affected.
778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.
778.407 The nature of the section 7(f) contract.
778.408 The specified regular rate.
778.409 Provision for overtime pay.
778.410 The guaranty under section 7(f).
778.411 Sixty-hour limit on pay guaranteed by contract.
778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.
778.413 Guaranty must be based on rates specified in contract.
778.414 "Approval" of contracts under section 7(f).

COMPUTING OVERTIME PAY ON THE RATE APPLICABLE TO THE TYPE OF WORK PERFORMED IN OVERTIME HOURS (SECS. 7(g)(1) AND (2))

778.415 The statutory provisions.
778.416 Purpose of provisions.
778.417 General requirements of section 7(g).
778.418 Pieceworkers.
778.419 Hourly workers employed at two or more jobs.
778.420 Combined hourly rates and piece rates.
778.421 Offset hour for hour.

BEST DOCUMENT AVAILABLE

Subpart F—Pay Plans Which Circumvent the Act

DEVICES TO EVADE THE OVERTIME REQUIREMENTS

Sec.
778.500 Artificial regular rates.
778.501 The "split-day" plan.

PSEUDO-BONUSES

778.502 Artificially labeling part of the regular wages a "bonus".
778.503 Pseudo "percentage bonuses".

Subpart G—Miscellaneous

778.600 Veterans' subsistence allowances.
778.601 Special overtime provisions available for hospital and residential care establishments under section 7(j).
778.602 Special overtime provisions under section 7(b).

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201-219, unless otherwise noted.

SOURCE: 33 FR 986, Jan. 26, 1968, unless otherwise noted.

Subpart A—General Considerations

§ 778.0 Introductory statement.

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, is a Federal statute of general application which establishes minimum wage, overtime pay, child labor, and equal pay requirements that apply as provided in the Act. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 778.1 Purpose of interpretative bulletin.

This Part 778 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Act. It is the purpose of this bulletin to make available in one place the interpretations of these provisions which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290).

§ 778.2 Coverage and exemptions not discussed.

This Part 778 does not deal with the general coverage of the Act or various specific exemptions provided in the statute, under which certain employees within the general coverage of the wage and hours provisions are wholly or partially excluded from the protection of the Act's minimum-wage and overtime-pay requirements. Some of these exemptions are self-executing; others call for definitions or other action by the Administrator. Regulations and interpretations relating to general coverage and specific exemptions may be found in other parts of this chapter.

§ 778.3 Interpretations made, continued, and superseded by this part.

On and after publication of this part in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as Part 778 of this chapter. Prior opinions, rulings and interpretations and prior enforcement policies which are not inconsistent with the interpreta-

BEST DOCUMENT AVAILABLE

tions in this part or with the Fair Labor Standards Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

[46 FR 7309, Jan. 23, 1981]

§ 778.4 Reliance on interpretations.

The interpretations of the law contained in this Part 778 are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84).

§ 778.5 Relation to other laws generally.

Various Federal, State, and local laws require the payment of minimum hourly, daily or weekly wages different from the minimum set forth in the Fair Labor Standards Act, and the payment of overtime compensation computed on bases different from those set forth in the Fair Labor Standards Act. Where such legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, nothing in the act, the regulations or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws. Compliance with other applicable legislation does not excuse noncompliance with the Fair Labor Standards Act. Where a higher minimum wage than that set in the Fair Labor Standards Act is applicable to an employee by virtue of such other legislation, the regular rate of the employee, as the term is used in the Fair Labor Standards Act, cannot be lower than such applicable minimum, for the words "regular rate at which he is employed" as used in section 7 must be construed to mean the regular rate at which he is lawfully employed.

§ 778.6 Effect of Davis-Bacon Act.

Section 1 of the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 276a) provides for the inclusion of certain fringe benefits in the prevailing wages that are predetermined by the Secretary of Labor, under that Act and related statutes, as minimum wages for laborers and mechanics employed by contractors and subcontractors performing construction activity on Federal and federally assisted projects. Laborers and mechanics performing work subject to such predetermined minimum wages may, if they work overtime, be subject to overtime compensation provisions of other laws which may apply concurrently to them, including the Fair Labor Standards Act. In view of this fact, specific provision was made in the Davis-Bacon Act for the treatment of such predetermined fringe benefits in the computation of overtime compensation under other applicable statutes including the Fair Labor Standards Act. The application of this provision is discussed in § 5.32 of this title, which should be considered together with the interpretations in this Part 778 in determining any overtime compensation payable under the Fair Labor Standards Act to such laborers and mechanics in any workweek when they are subject to fringe benefit wage determinations under the Davis-Bacon and related acts.

§ 778.7 Effect of Service Contract Act of 1965.

The McNamara-O'Hara Service Contract Act of 1965, which provides for the predetermination and the specification in service contracts entered into by the Federal Government or the District of Columbia, of the minimum wages and fringe benefits to be received by employees of contractors and subcontractors employed in work on such contracts, contains the following provision:

> SEC. 6. In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e)* thereof. (*Subsection designation changed in text from section 7(d) to 7(e) to

conform with the relettering enacted by the Fair Labor Standards Amendments of 1966.)

Where the fringe benefits specified in such a service contract are furnished to an employee, the above provision permits exclusion of such fringe benefits from the employee's regular rate of pay under the Fair Labor Standards Act pursuant to the rules and principles set forth in Subpart C of this Part 778. However, the McNamara-O'Hara Act permits an employer to discharge his obligation to provide the specified fringe benefits by furnishing any equivalent combinations of bona fide fringe benefits or by making equivalent or differential payments in cash. Permissible methods of doing this are set forth in Part 4 of this title, Subpart B. If the employer furnishes equivalent benefits or makes cash payments, or both, to an employee as therein authorized, the amounts thereof, to the extent that they operate to discharge the employer's obligation under the McNamara-O'Hara Act to furnish such specified fringe benefits, may be excluded pursuant to such Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under the Fair Labor Standards Act, pursuant to the rule provided in § 4.55 of this title. This means that such equivalent fringe benefits or cash payments which are authorized under the McNamara-O'Hara Act to be provided in lieu of the fringe benefits specified in determinations issued under such Act are excludable from the regular rate in applying the overtime provisions of the Fair Labor Standards Act if the fringe benefits specified under the McNamara-O'Hara Act would be so excludable if actually furnished. This is true regardless of whether the equivalent benefits or payments themselves meet the requirements of section 7(e) of the Fair Labor Standards Act and Subpart C of this Part 778.

Subpart B—The Overtime Pay Requirements

INTRODUCTORY

§ 778.100 The maximum-hours provisions.

Section 7(a) of the Act deals with maximum hours and overtime compensation for employees who are within the general coverage of the Act and are not specifically exempt from its overtime pay requirements. It prescribes the maximum weekly hours of work permitted for the employment of such employees in any workweek without extra compensation for overtime, and a general overtime rate of pay not less than one and one-half times the employee's regular rate which the employee must receive for all hours worked in any workweek in excess of the applicable maximum hours. The employment by an employer of an employee in any work subject to the Act in any workweek brings these provisions into operation. The employer is prohibited from employing the employee in excess of the prescribed maximum hours in such workweek without paying him the required extra compensation for the overtime hours worked at a rate meeting the statutory requirement.

§ 778.101 Maximum nonovertime hours.

As a general standard, section 7(a) of the Act provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime. Hours worked in excess of the statutory maximum in any workweek are overtime hours under the statute; a workweek no longer than the prescribed maximum is a nonovertime workweek under the Act, to which the pay requirements of section 6 (minimum wage and equal pay) but not those of section 7(a) are applicable.

[46 FR 7309, Jan. 23, 1981]

§ 778.102 Application of overtime provisions generally.

Since there is no absolute limitation in the Act (apart from the child labor provisions and regulations thereunder) on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 7(a). The Act does not generally require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than the maximum number of hours prescribed in the Act are actually worked in the workweek, overtime compensation pursuant to section 7(a) need not be paid. Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract or of any obligation imposed by other Federal or State law to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday. (The effect of making such payments is discussed in §§ 778.201-207 and 778.219.)

[46 FR 7309, Jan. 23, 1981]

§ 778.103 The workweek as the basis for applying section 7(a).

If in any workweek an employee is covered by the Act and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek (even though two or more unrelated job assignments may have been performed), and pay overtime compensation for each hour worked in excess of the maximum hours applicable under section 7(a) of the Act. In the case of an employee employed jointly by two or more employers (see Part 791 of this chapter), all hours worked by the employee for such employers during the workweek must be totaled in determining the number of hours to be compensated in accordance with section 7(a). The principles for determining what hours are hours worked within the meaning of the Act are discussed in Part 785 of this chapter.

§ 778.104 Each workweek stands alone.

The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40. This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis. The rule is also applicable to pieceworkers and employees paid on a commission basis. It is therefore necessary to determine the hours worked and the compensation earned by pieceworkers and commission employees on a weekly basis.

§ 778.105 Determining the workweek.

An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. The proper method of computing overtime pay in a period in which a change in the time of commencement of the workweek is made, is discussed in §§ 778.301 and 778.302.

§ 778.106 Time of payment.

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, see § 778.209.

PRINCIPLES FOR COMPUTING OVERTIME PAY BASED ON THE "REGULAR RATE"

§ 778.107 General standard for overtime pay.

The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under section 6 of the Act, except in the case of workers specially provided for in section 14 and workers in Puerto Rico, the Virgin Islands, and American Samoa who are covered by wage orders issued pursuant to section 8 of the Act.) If the employee's regular rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half times such higher rate. Under certain conditions prescribed in section 7 (f), (g), and (j), the Act provides limited exceptions to the application of the general standard of section 7(a) for computing overtime pay based on the regular rate. With respect to these, see §§ 778.400 through 778.421 and 778.601 and Part 548 of this chapter. The Act also provides, in section 7(b), (i), (k) and (m) and in section 13, certain partial and total exemptions from the application of section 7(a) to certain employees and under certain conditions. Regulations and interpretations concerning these exemptions are outside the scope of this Part 778 and reference should be made to other applicable parts of this chapter.

[46 FR 7309, Jan. 23, 1981]

§ 778.108 The "regular rate".

The "regular rate" of pay under the Act cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract (Bay Ridge Operating Co. v. Aaron, 334 U.S. 446). The Supreme Court has described it as the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed—an "actual fact" (Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419). Section 7(e) of the Act requires inclusion in the "regular rate" of "all remuneration for employment paid to, or on behalf of, the employee" except payments specifically excluded by paragraphs (1) through (7) of that subsection. (These seven types of payments, which are set forth in § 778.200 and discussed in §§ 778.201 through 778.224, are hereafter referred to as "statutory exclusions.") As stated by the Supreme Court in the Youngerman-Reynolds case cited above: "Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

§ 778.109 The regular rate is an hourly rate.

The "regular rate" under the Act is a rate per hour. The Act does not require employers to compensate employees on an hourly rate basis; their earnings may be determined on a piece-rate, salary, commission, or other basis, but in such case the overtime compensation due to employees must be computed on the basis of the hourly rate derived therefrom and, therefore, it is necessary to compute the regular hourly rate of such employees during each workweek, with certain statutory exceptions discussed in §§ 778.400-778.421. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by him in that workweek for which such compensation was paid. The following sections give some examples of the proper method of determining the regular rate of pay in particular instances: (The maximum hours standard used in these examples is 40 hours in a workweek).

§ 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his "regular rate." For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $6 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $294 (46 hours at $6 plus 6 at $3). In other words, the employee is entitled to be paid an amount equal to $6 an hour for 40 hours and $9 an hour for the 6 hours of overtime, or a total of $294.

(b) *Hourly rate and bonus.* If the employee receives, in addition to his earnings at the hourly rate, a production bonus of $9.20, the regular hourly rate of pay is $6.20 an hour (46 hours at $6 yields $276; the addition of the $9.20 bonus makes a total of $285.20; this total divided by 46 hours yields a rate of $6.20). The employee is then entitled to be paid a total wage of $303.80 for 46 hours (46 hours at $6.20 plus 6 hours at $3.10, or 40 hours at $6.20 plus 6 hours at $9.30).

[46 FR 7309, Jan. 23, 1981]

§ 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, his regular hourly rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions): This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For his overtime work the pieceworker is entitled to be paid, in addition to his total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, see § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned $245.50 at piece rates for 46 hours of productive work and in addition has been compensated at $5.00 an hour for 4 hours of waiting time, his total compensation, $265.50 must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay—$5.31. For the 10 hours of overtime the employee is entitled to additional compensation of $26.55 (10 hours at $2.655). For the week's work he is thus entitled to a total of $292.05 (which is equivalent to 40 hours at $5.31 plus 10 overtime hours at $7.965).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty which he was paid is his regular rate in that week. In the example just given, if the employee was guaranteed $5.50 an hour for productive working time, he would be paid $253 (46×$5.50) for the 46 hours of productive work (instead of the $245.50 earned at piece rates). In a week in which no waiting time was involved, he would be owed an additional $2.75 (half time) for each of the 6 overtime hours worked, to bring his total compensation up to $269.50 (46 hours at $5.50 plus 6 hours at $2.75 or 40 hours at $5.50 plus 6 hours at $8.25). If he is paid at a different rate for waiting time, his regular rate is the weighted average of the 2 hourly rates, as discussed in § 778.115.

[46 FR 7309, Jan. 23, 1981]

§ 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

§ 778.113 Salaried employees—general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.

(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $1,040, or a regular semimonthly salary of $520 for 40 hours a week, is thus found to be $6 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

[46 FR 7310, Jan. 23, 1981]

§ 778.114 Fixed salary for fluctuating hours.

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

§ 778.115 Employees working at two or more rates.

Where an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay (of not less than the applicable minimum wage) have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings (except statutory exclusions) are computed to include his compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. Certain statutory exceptions permitting alternative methods of computing overtime pay in such cases are discussed in §§ 778.400 and 778.415 through 778.421.

§ 778.116 Payments other than cash.

Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. (See Part 531 of this chapter for a discussion as to the inclusion of goods and facilities in wages and the method of determining reasonable cost.) Where, for example, an employer furnishes lodging to his employees in addition to cash wages the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

[46 FR 7310, Jan. 23, 1981]

§ 778.117 Commission payments—general.

Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. This is true regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis, and regardless of the method, frequency, or regularity of computing, allocating and paying the commission. It does not matter whether the commission earnings are computed daily, weekly, biweekly, semimonthly, monthly, or at some other interval. The fact that the commission is paid on a basis other than weekly, and that payment is delayed for a time past the employee's normal pay day or pay period, does not excuse the employer from including this payment in the employee's regular rate.

[36 FR 4981, Mar. 16, 1971]

§ 778.118 Commission paid on a workweek basis.

When the commission is paid on a weekly basis, it is added to the employee's other earnings for that workweek (except overtime premiums and other payments excluded as provided in section 7(e) of the Act), and the total is divided by the total number of hours worked in the workweek to obtain the employee's regular hourly rate for the particular workweek. The employee must then be paid extra compensation at one-half of that rate for each hour worked in excess of the applicable maximum hours standard.

§ 778.119 Deferred commission payments—general rules.

If the calculation and payment of the commission cannot be completed until sometime after the regular pay day for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained. Until that is done he may pay compensation for overtime at a rate not less than one and one-half times the hourly rate paid the employee, exclusive of the commission. When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, it is necessary, as a general rule, that the commission be apportioned back over the workweeks of the period during which it was earned. The employee must then receive additional overtime compensation for each week during the period in which he worked in excess of the applicable maximum hours standard. The additional compensation for that workweek must be not less than one-half of the increase in the hourly rate of pay attributable to the commission for that week multipled by the number of hours worked in excess of the applicable maximum hours standard in that workweek.

§ 778.120 Deferred commission payments not identifiable as earned in particular workweeks.

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other reasonable and equitable method must be adopted. The following methods may be used:

(a) *Allocation of equal amounts to each week.* Assume that the employee earned an equal amount of commission in each week of the commission computation period and compute any additional overtime compensation due on this amount. This may be done as follows:

(1) For a commission computation period of 1 month, multiply the commission payment by 12 and divide by 52 to get the amount of commission allocable to a single week. If there is a semimonthly computation period, multiply the commission payment by 24 and divide by 52 to get each week's commission. For a commission computation period of a specific number of

workweeks, such as every 4 weeks (as distinguished from every month) divide the total amount of commission by the number of weeks for which it represents additional compensation to get the amount of commission allocable to each week.

(2) Once the amount of commission allocable to a workweek has been ascertained for each week in which overtime was worked, the commission for that week is divided by the total number of hours worked in that week, to get the increase in the hourly rate. Additional overtime due is computed by multiplying one-half of this figure by the number of overtime hours worked in the week. A shorter method of obtaining the amount of additional overtime compensation due is to multiply the amount of commission allocable to the week by the decimal equivalent of the fraction

$$\frac{\text{Overtime hours}}{\text{Total hours} \times 2}.$$

A coefficient table (WH-134) has been prepared which contains the appropriate decimals for computing the extra half-time due.

Examples:

(i) If there is a monthly commission payment of $416, the amount of commission allocable to a single week is $96 ($416×12=$4,992÷52=$96). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $96 by 48 gives the increase to the regular rate of $2. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $8. The $96 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table) to get the additional overtime pay due of $8.

(ii) An employee received $384 in commissions for a 4-week period. Dividing this by 4 gives him a weekly increase of $96. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $4.36 for the first and third week ($96÷44=$2.18÷2=$1.09×4 overtime hours=$4.36), no extra compensation for the second week during which no overtime hours were worked, and $8 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) *Allocation of equal amounts to each hour worked.* Sometimes, there are facts which make it inappropriate to assume equal commission earnings for each workweek. For example, the number of hours worked each week may vary significantly. In such cases, rather than following the method outlined in paragraph (a) of this section, it is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period. The amount of the commission payment should be divided by the number of hours worked in the period in order to determine the amount of the increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission computation period, to get the amount of additional overtime compensation due for this period.

Example: An employee received commissions of $192 for a commission computation period of 96 hours, including 16 overtime hours (i.e., two workweeks of 48 hours each). Dividing the $192 by 96 gives a $2 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due an additional $16 for the commission computation period, representing an additional $1 for each of the 16 overtime hours.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

§ 778.121 Commission payments—delayed credits and debits.

If there are delays in crediting sales or debiting returns or allowances which affect the computation of commissions, the amounts paid to the employee for the computation period will be accepted as the total commission earnings of the employee during such period, and the commission may be allocated over the period from the last commission computation date to the present commission computation date, even though there may be credits or debits resulting from work which actually occurred during a previous period. The hourly increase resulting from the commission may be computed as outlined in the preceding paragraphs.

§ 778.122 Computation of overtime for commission employees on established basic rate.

Overtime pay for employees paid wholly or partly on a commission basis may be computed on an established basic rate, in lieu of the method described above. See § 778.400 and Part 548 of this chapter.

Subpart C—Payments That May Be Excluded From the "Regular Rate"

THE STATUTORY PROVISIONS

§ 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) *Section 7(e)*. This subsection of the Act provides as follows:

> As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> (1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency; [discussed in § 778.212].
>
> (2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment; [discussed in §§ 778.216 through 778.224].
>
> (3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs; [discussed in §§ 778.208 through 778.215 and 778.225].
>
> (4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees; [discussed in §§ 778.214 and 778.215].
>
> (5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be; [discussed in §§ 778.201 and 778.202].
>
> (6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or [discussed in §§ 778.203, 778.205, and 778.206].
>
> (7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; [discussed in §§ 778.201 and 778.206].

(b) *Section 7(h)*. This subsection of the Act provides as follows:

> Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(c) *Only the statutory exclusions are authorized.* It is important to determine the scope of these exclusions, since all remuneration for employment paid to employees which does not fall within one of these seven exclusionary clauses must be added into

BEST DOCUMENT AVAILABLE

the total compensation received by the employee before his regular hourly rate of pay is determined.

EXTRA COMPENSATION PAID FOR OVERTIME

§ 778.201 Overtime premiums—general.

(a) Certain premium payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days are regarded as overtime premiums. In such case, the extra compensation provided by the premium rates need not be included in the employee's regular rate of pay for the purpose of computing overtime compensation due under section 7(a) of the Act. Moreover, under section 7(h) this extra compensation may be credited toward the overtime payments required by the Act.

(b) The three types of extra premium payments which may thus be treated as overtime premiums for purposes of the Act are outlined in section 7(e) (5), (6), and (7) of the Act as set forth in § 778.200(a). These are discussed in detail in the sections following.

(c) Section 7(h) of the Act specifically states that the extra compensation provided by these three types of payments may be credited toward overtime compensation due under section 7(a) for work in excess of the applicable maximum hours standard. No other types of remuneration for employment may be so credited.

§ 778.202 Premium pay for hours in excess of a daily or weekly standard.

(a) *Hours in excess of 8 per day or statutory weekly standard.* Many employment contracts provide for the payment of overtime compensation for hours worked in excess of 8 per day or 40 per week. Under some contracts such overtime compensation is fixed at one and one-half times the base rate; under others the overtime rate may be greater or less than one and one-half times the base rate. If the payment of such contract overtime compensation is in fact contingent upon the employee's having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified in section 7(a) of the Act as the weekly maximum, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act. In applying these rules to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, as these terms are explained in §§ 778.216 to 778.224, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay, due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) *Hours in excess of normal or regular working hours.* Similarly, where the employee's normal or regular daily or weekly working hours are greater or less than 8 hours and 40 hours respectively and his contract provides for the payment of premium rates for work in excess of such normal or regular hours of work for the day or week (such as 7 in a day or 35 in a week) the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited toward overtime compensation due under the Act.

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of $5.75 an hour and receives, as overtime compensation under his contract, $6.25 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee's regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of $6.75 for

BEST DOCUMENT AVAILABLE

hours in excess of 12 per day, the extra $1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5), the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee's normal or regular working hours. If the normal workday is artificially divided into a "straight time" period to which one rate is assigned, followed by a so-called "overtime" period for which a higher "rate" is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

(d) *Hours in excess of other statutory standard.* Where payment at premium rates for hours worked in excess of a specified daily or weekly standard is made pursuant to the requirements of another applicable statute, the extra compensation provided by such premium rates will be regarded as a true overtime premium.

(e) *Premium pay for sixth or seventh day worked.* Under section 7(e)(6) and 7(h), extra premium compensation paid pursuant to contract or statute for work on the sixth or seventh day worked in the workweek is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee's normal or regular workweek.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7311, Jan. 23, 1981]

§ 778.203 Premium pay for work on Saturdays, Sundays, and other "special days".

Under section 7(e)(6) and 7(h) of the Act, extra compensation provided by a Premium rate of at least time and one-half which is paid for work on Saturdays, Sundays, holidays, or regular days of rest or on the sixth or seventh day of the workweek (hereinafter referred to as "special days") may be treated as an overtime premium for the purposes of the Act. If the premium rate is less than time and one-half, the extra compensation provided by such rate must be included in determining the employee's regular rate of pay and cannot be credited toward statutory overtime due, unless it qualifies as an overtime premium under section 7(e)(5).

(a) "Special days" rate must be at least time and one-half to qualify as overtime premium: The premium rate must be at least "one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days." Where an employee is hired on the basis of a salary for a fixed workweek or at a single hourly rate of pay, the rate paid for work on "special days" must be at least time and one-half his regular hourly rate in order to qualify under section 7(e)(6). If the employee is a pieceworker or if he works at more than one job for which different hourly or piece rates have been established and these are bona fide rates applicable to the work when performed during nonovertime hours, the extra compensation provided by a premium rate of at least one and one-half times either (1) the bona fide rate applicable to the type of job the employee performs on the "special days", or (2) the average hourly earnings in the week in question, will qualify as an overtime premium under this section. (For a fuller discussion of computation on the average rate, see § 778.111; on the rate applicable to the job, see §§ 778.415 through 778.421; on the "established" rate, see § 778.400.)

(b) Bona fide base rate required. The statute authorizes such premiums paid for work on "special days" to be treated as overtime premiums only if they are actually based on a "rate established in good faith for like work performed in nonovertime hours on other days." This phrase is used for the purpose of distinguishing the bona fide employment standards contemplated by section 7(e)(6) from fictitious schemes and artificial or evasive devices as discussed in Subpart F of this part. Clearly, a rate which yields the employee less than time and one-half the minimum rate prescribed by the Act would not be a rate established in good faith.

(c) Work on the specified "special days": To qualify as an overtime premium under section 7(e)(6), the extra compensation must be paid for work on the specified days. The term "holiday" is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion. A day of rest arbitrarily granted to employees because of lack of work is not a "holiday" within the meaning of this section, nor is it a "regular day of rest." The term "regular day of rest" means a day on which the employee in accordance with his regular prearranged schedule is not expected to report for work. In some instances the "regular day of rest" occurs on the same day or days each week for a particular employee; in other cases, pursuant to a swing shift schedule, the schedule day of rest rotates in a definite pattern, such as 6 days work followed by 2 days of rest. In either case the extra compensation provided by a premium rate for work on such scheduled days of rest (if such rate is at least one and one-half times the bona fide rate established for like work during nonovertime hours on other days) may be treated as an overtime premium and thus need not be included in computing the employee's regular rate of pay and may be credited toward overtime payments due under the Act.

(d) Payment of premiums for work performed on the "special day": To qualify as an overtime premium under section 7(e)(6), the premium must be paid because work is performed on the days specified and not for some other reason which would not qualify the premium as an overtime premium under section 7(e)(5), (6), or (7). (For examples distinguishing pay for work on a holiday from idle holiday pay, see § 778.219.) Thus a premium rate paid to an employee only when he received less than 24 hours' notice that he is required to report for work on his regular day of rest is not a premium paid for work on one of the specified days; it is a premium imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his private life. The extra compensation is not an overtime premium. It is part of his regular rate of pay unless such extra compensation is paid the employee on infrequent and sporadic occasions so as to qualify for exclusion under section 7(e)(2) in which event it need not be included in computing his regular rate of pay, as explained in § 778.222.

§ 778.204 "Clock pattern" premium pay.

(a) *Overtime premiums under section 7(e)(7).* Where a collective bargaining agreement or other applicable employment contract in good faith establishes certain hours of the day as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum hours standard applicable under section 7(a)) and provides for the payment of a premium rate for work outside such hours, the extra compensation provided by such premium rate will be treated as an overtime premium if the premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during the basic, normal or regular workday or workweek.

(b) *Premiums for hours outside established working hours.* To qualify as an overtime premium under section 7(e)(7) the premium must be paid because the work was performed during hours "outside of the hours established * * * as the basic * * * workday or workweek" and not for some other reason. Thus, if the basic workday is established in good faith as the hours from 8 a.m. to 5 p.m. a premium of time and one-half paid for hours between 5 p.m. and 8 a.m. would qualify as an overtime premium. However, where the contract does not provide for the payment of a premium except for work between midnight and 6 a.m. the premium would not qualify under this section since it is not a premium paid for work outside the established workday but only for certain special hours outside the established workday, in most instances because they are undesirable hours. Similarly, where payments of premium rates for work are made after 5 p.m. only if the employee has not had a meal period or rest period, they are not regarded as overtime premiums; they are premiums paid because of undesirable working conditions.

(c) *Payment in pursuance of agreement.* Premiums of the type which section 7(e)(7) authorizes to be treated as overtime premiums must be paid "in pursuance of an applicable employment contract or collective bargaining agreement," and the rates of pay and the daily and weekly work periods referred to must be established in good faith by such contract or agreement. Although as a general rule a collective bargaining agreement is a formal agreement which has been reduced to writing, an employment contract for purposes of section 7(e)(7) may be either written or oral. Where there is a written employment contract and the practices of the parties differ from its provisions, it must be determined whether the practices of the parties have modified the contract. If the practices of the parties have modified the written provisions of the contract, the provisions of the contract as modified by the practices of the parties will be controlling in determining whether the requirements of section 7(e)(7) are satisfied. The determination as to the existence of the requisite provisions in an applicable oral employment contract will necessarily be based on all the facts, including those showing the terms of the oral contract and the actual employment and pay practices thereunder.

§ 778.205 Premiums for weekend and holiday work—example.

The application of section 7(e)(6) may be illustrated by the following example: Suppose an agreement of employment calls for the payment of $7.50 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of $5 for like work performed during nonovertime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of $320 to which the employee is entitled under the employment agreement will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra $20 paid for work on Sunday and the extra $20 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

[46 FR 7311, Jan. 23, 1981]

§ 778.206 Premiums for work outside basic workday or workweek—examples.

The effect of section 7(e)(7) where "clock pattern" premiums are paid may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employers and employees in the longshore and stevedoring industries. These agreements specify straight time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. Under one such agreement, for example, such workday and workweek are established as the first 6 hours of work, exclusive of mealtime, each day, Monday through Friday, between the hours of 8 a.m. and 5 p.m. Under another typical agreement, such workday and workweek are established as the hours between 8 a.m. and 12 noon and between 1 p.m. and 5 p.m., Monday through Friday. Work outside such workday and workweek is paid for at premium rates not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal, or regular workday or workweek. The extra compensation provided by such premium rates will be excluded in computing the regular rate at which the employees so paid are employed and may be credited toward overtime compensation due under the Act. For example, if an employee is paid $5 an hour under such an agreement for handling general cargo during the basic, normal, or regular workday and $7.50 per hour for like work outside of such workday, the extra $2.50 will be excluded from the regular rate and may be credited to overtime pay due under the Act. Similarly, if the straight time rate established in good faith by the contract should be higher because of handling dangerous or obnoxious cargo, recognition of skill differentials, or similar reasons, so as to be $7.50 an hour during the hours established as the basic or normal or regular workday or workweek, and a premium rate of $11.25 an hour is paid for the same work performed during other hours of the day or week, the extra $3.75 may be excluded from the regular rate of pay and may be credited toward overtime pay due under the Act. Similar principles are applicable where agreements following this general pattern exist in other industries.

[46 FR 7311, Jan. 23, 1981]

§ 778.207 Other types of contract premium pay distinguished.

(a) *Overtime premiums are those defined by the statute.* The various types of contract premium rates which provide extra compensation qualifying as overtime premiums to be excluded from the regular rate (under section 7(e) (5), (6), and (7) and credited toward statutory overtime pay requirements (under section 7(h)) have been described in §§ 778.201 through 778.206. The plain wording of the statute makes it clear that extra compensation provided by premium rates other than those described cannot be treated as overtime premiums. Wherever such other premiums are paid, they must be included in the employee's regular rate before statutory overtime compensation is computed; no part of such premiums may be credited toward statutory overtime pay.

(b) *Nonovertime premiums.* The Act requires the inclusion in the regular rate of such extra premiums as nightshift differentials (whether they take the form of a percent of the base rate or an addition of so many cents per hour) and premiums paid for hazardous, arduous or dirty work. It also requires inclusion of any extra compensation which is paid as an incentive for the rapid performance of work, and since any extra compensation in order to qualify as an overtime premium must be provided by a premium rate per hour, except in the special case of pieceworkers as discussed in § 778.418, lump sum premiums which are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate. For example, where an employer pays 8 hours' pay for a particular job whether it is performed in 8 hours or in less time, the extra premium of 2 hours' pay received by an employee who completes the job in 6 hours must be included in his regular rate. Similarly, where an employer pays for 8 hours at premium rates for a job performed during the overtime hours whether it is completed in 8 hours or less, no part of the premium paid qualifies as overtime premium under sections 7(e) (5), (6), or (7). (For a further discussion of this and related problems, see §§ 778.308 to 778.314.)

BONUSES

§ 778.208 Inclusion and exclusion of bonuses in computing the "regular rate."

Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except seven specified types of payments. Among these excludable payments are discretionary bonuses, gifts and payments in the nature of gifts on special occasions, contributions by the employer to certain welfare plans and payments made by the employer pursuant to certain profit-sharing, thrift and savings plans. These are discussed in §§ 778.211 through 778.214. Bonuses which do not qualify for exclusion from the regular rate as one of these types must be totaled in with other earnings to determine the regular rate on which overtime pay must be based. Bonus payments are payments made in addition to the regular earnings of an employee. For a discussion on the bonus form as an evasive bookkeeping device, see §§ 778.502 and 778.503.

§ 778.209 Method of inclusion of bonus in regular rate.

(a) *General rules.* Where a bonus payment is considered a part of the regular rate at which an employee is employed, it must be included in computing his regular hourly rate of pay and overtime compensation. No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked. Under many bonus plans, however, calculations of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained. Until that is done he may pay compensation for overtime at one and one-half times the hourly rate paid by the employee, exclusive of the bonus. When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned. The employee must then receive an additional amount of compensation for each workweek that he worked overtime during the period equal to one-half of the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.

(b) *Allocation of bonus where bonus earnings cannot be identified with particular workweeks.* If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus relates, and if the facts support this assumption additional compensation for each overtime week of the period may be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. Or, if there are facts which make it inappropriate to assume equal bonus earnings for each workweek, it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase may be determined by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase.

§ 778.210 Percentage of total earnings as bonus.

In some instances the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus. For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings. In such instances, of course, payments according to the contract will satisfy in full the overtime provisions of the Act and no recomputation will be required. This is not true, however, where this form of payment is used as a device to evade the overtime requirements of the Act rather than to provide actual overtime compensation, as described in §§ 778.502 and 778.503.

§ 778.211 Discretionary bonuses.

(a) *Statutory provision.* Section 7(e)(3)(a) of the Act provides that the regular rate shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Discretionary character of excluded bonus.* In order for a bonus to qualify for exclusion as a discretionary bonus under section 7(e)(3)(a) the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid. The sum, if any, to be paid as a bonus is determined by the employer without prior promise or agreement. The employee has no contract right, express or implied, to any amount. If the employer promises in advance to pay a bonus, he has abandoned his discretion with regard to it. Thus, if an employer announces to his employees in January that he intends to pay them a bonus in June, he has thereby abandoned his discretion regarding the fact of payment by promising a bonus to his employees. Such a bonus would not be excluded from the regular rate under section 7(e)(3)(a). Similarly, an employer who promises to sales employees that they will receive a monthly bonus computed on the basis of allocating 1 cent for each item sold whenever, is his discretion, the financial condition of the firm warrants such payments, has abandoned discretion with regard to the amount of the bonus though not with regard to the fact of payment. Such a bonus would not be excluded from the regular rate. On the other hand, if a bonus such as the one just described were paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion, the bonus would be properly excluded from the regular rate.

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a), must not be paid "pursuant to any prior contract, agreement, or promise." For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category. They must be included in the regular rate of pay.

§ 778.212 Gifts, Christmas and special occasion bonuses.

(a) *Statutory provision.* Section 7(e)(1) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency * * *". Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Gift or similar payment.* To qualify for exclusion under section 7(e)(1) the bonus must be actually a gift or in the nature of a gift. If it is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift. If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift. Obviously, if the bonus is paid pursuant to contract (so that the employee has a legal right to the payment and could bring suit to enforce it), it is not in the nature of a gift.

(c) *Application of exclusion.* If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category.

§ 778.213 Profit-sharing, thrift, and savings plans.

Section 7(e)(3)(b) of the Act provides that the term "regular rate" shall not be deemed to include "sums paid in recognition of services performed during a given period if * * * the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations * * *". Such sums may not, however, be credited toward overtime compensation due under the Act. The regulations issued under this section are Parts 547 and 549 of this chapter. Payments in addition to the regular wages of the employee, made by the employer pursuant to a plan which meets the requirements of the regulations in Part 547 or 549 of this chapter, will be properly excluded from the regular rate.

§ 778.214 Benefit plans; including profit-sharing plans or trusts providing similar benefits.

(a) *Statutory provision.* Section 7(e)(4) of the Act provides that the term "regular rate" shall not be deemed to include: "contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees * * *." Such sums may not, however, be credited toward overtime compensation due under the Act.

(b) *Scope and application of exclusion generally.* Plans for providing benefits of the kinds described in section 7(e)(4) are referred to herein as "benefit plans". It is section 7(e)(4) which governs the status for regular rate purposes of any contributions made by an employer pursuant to a plan for providing the described benefits. This is true irrespective of any other features the plan may have. Thus, it makes no difference whether or not the benefit plan is one financed out of profits or one which by matching employee contributions or otherwise encourages thrift or savings. Where such a plan or trust is combined in a single program (whether in one or more documents) with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the Profit-Sharing Regulations, Part 549 of this chapter, and the contributions made by the employer for providing the benefits described in section 7(e)(4) of the Act may be excluded from the regular rate if they meet the tests set forth in § 778.215. Advance approval by the Department of Labor is not required.

(c) *Tests must be applied to employer contributions.* It should be emphasized that it is the employer's contribution made pursuant to the benefit plan that is excluded from or included in the regular rate according to whether or not the requirements set forth in § 778.215 are met. If the contribution is not made as provided in section 7(e)(4) or if the plan does not qualify as a bona fide benefit plan under that section, the contribution is treated the same as any bonus payment which is part of the regular rate of pay, and at the time the contribution is made the amount thereof must be apportioned back over the workweeks of the period during which it may be said to have accrued. Overtime compensation based upon the resultant increases in the regular hourly rate is due for each overtime hour worked during any workweek of the period. The subsequent distribution of accrued funds to an employee on account of severance of employment (or for any other reason) would not result in any increase in his regular rate in the week in which the distribution is made.

(d) *Employer contributions when included in fringe benefit wage determinations under Davis-Bacon Act.* As noted in § 778.6 where certain fringe benefits are included in the wage predeterminations of the Secretary of Labor for laborers and mechanics performing contract work subject to the Davis-Bacon Act and related statutes, the provisions of Pub. L. 88-349 discussed in § 5.32 of this title should be considered together with the interpretations in this Part 778 in determining the excludability of such fringe benefits from the regular rate of such employees. Accordingly, reference should be made to § 5.32 of this title as well as to § 778.215 for guidance with respect to exclusion from the employee's regular rate of contributions made by the employer to any benefit plan if, in the workweek or workweeks involved, the employee performed work as a laborer or mechanic subject to a wage determination made by the Secretary pursuant to Part 1 of this title, and if fringe benefits of the kind represented by such contributions constitute a part of the prevailing wages required to be paid such employee in accordance with such wage determination.

(e) *Employer contributions or equivalents pursuant to fringe benefit determinations under Service Contract Act of 1965.* Contributions by contractors and subcontractors to provide fringe benefits specified under the McNamara-O'Hara Service Contract Act of 1965, which are of the kind referred to in section 7(e)(4), are excludable from the regular rate under the conditions set forth in § 778.215. Where the fringe benefit contributions specified under such Act are so excludable, equivalent benefits or payments provided by the employer in satisfaction of his obligation to provide the specified benefits are also excludable from the regular rate if authorized under Part 4 of this title, Subpart B, pursuant to the McNamara-O'Hara Act, and their exclusion therefrom is not dependent on whether such equivalents, if separately considered, would meet the requirements of § 778.215. See § 778.7.

[33 FR 986, Jan. 26, 1968, as amended at 36 FR 4699, Mar. 11, 1971]

§ 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) *General rules.* In order for an employer's contribution to qualify for exclusion from the regular rate under section 7(e)(4) of the Act the following conditions must be met:

(1) The contributions must be made pursuant to a specific plan or program adopted by the employer, or by contract as a result of collective bargaining, and communicated to the employees. This may be either a company-financed plan or an employer-employee contributory plan.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.

(3) In a plan or trust, either:

(i) The benefits must be specified or definitely determinable on an actuarial basis; or

(ii) There must be both a definite formula for determining the amount to be contributed by the employer and a definite formula for determining the benefits for each of the employees participating in the plan; or

(iii) There must be both a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

(iv) NOTE: The requirements in paragraphs (a)(3) (ii) and (iii) of this section for a formula for determining the amount to be contributed by the employer may be met by a formula which requires a specific and substantial minimum contribution and which provides that the employer may add somewhat to that amount within specified limits; provided, however, that there is a reasonable relationship between the specified minimum and maximum contributions. Thus, formulas providing for a minimum contribution of 10 percent of profits and giving the employer discretion to add to that amount up to 20 percent of profits, or for a minimum contribution of 5 percent of compensation and discretion to increase up to a maximum of 15 percent of compensation, would meet the requirement. However, a plan which provides for insignificant minimum contributions and permits a variation so great that, for all practical purposes, the formula becomes meaningless as a measure of contributions, would not meet the requirements.

(4) The employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applica-

ble law. The trust or fund must be set up in such a way that in no event will the employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime rates. See Part 531 of this chapter.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of marking payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

(5) The plan must not give an employee the right to assign his benefits under the plan nor the option to receive any part of the employer's contributions in cash instead of the benefits under the plan: *Provided, however,* That if a plan otherwise qualified as a bona fide benefit plan under section 7(e)(4) of the Act, it will still be regarded as a bona fide plan even though it provides, as an incidental part thereof, for the payment to an employee in cash of all or a part of the amount standing to his credit (i) at the time of the severance of the employment relation due to causes other than retirement, disability, or death, or (ii) upon proper termination of the plan, or (iii) during the course of his employment under circumstances specified in the plan and not inconsistent with the general purposes of the plan to provide the benefits described in section 7(e)(4) of the Act.

(b) *Plans under section 401(a) of the Internal Revenue Code.* Where the benfit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in paragraphs (a) (1), (4), and (5) of this section.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7312, Jan. 23, 1981]

PAYMENTS NOT FOR HOURS WORKED

§ 778.216 The provisions of section 7(e)(2) of the Act.

Section 7(e)(2) of the Act provides that the term "regular rate" shall not be deemed to include "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment * * *." However, since such payments are not made as compensation for the employee's hours worked in any workweek, no part of such payments can be credited toward overtime compensation due under the Act.

§ 778.217 Reimbursement for expenses.

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) *Illustrations.* Payment by way of reimbursement for the following types of expenses will not be regarded as part of the employee's regular rate:

(1) The actual amount expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of his employer.

(2) The actual or reasonably approximate amount expended by an employee in purchasing, laundering or repairing uniforms or special clothing which his employer requires him to wear.

(3) The actual or reasonably approximate amount expended by an employee, who is traveling "over the road" on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

(4) "Supper money", a reasonable amount given to an employee, who ordinarily works the day shift and can ordinarily return home for supper, to cover the cost of supper when he is requested by his employer to continue work during the evening hours.

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had an opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

The foregoing list is intended to be illustrative rather than exhaustive.

(c) *Payments excluding expenses.* It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.

(d) *Payments for expenses personal to the employee.* The expenses for which reimbursement is made must in order to merit exclusion from the regular rate under this section, be expenses incurred by the employee on the employer's behalf or for his benefit or convenience. If the employer reimburses the employee for expenses normally incurred by the employee for his own benefit, he is, of course, increasing the employee's regular rate thereby. An employee normally incurs expenses in traveling to and from work, buying lunch, paying rent, and the like. If the employer reimburses him for these normal everyday expenses, the payment is not excluded from the regular rate as "reimbursement for expenses." Whether the employer "reimburses" the employee for such expenses or furnishes the facilities (such as free lunches or free housing), the amount paid to the employee (or the reasonable cost to the employer or fair value where facilities are furnished) enters into the regular rate of pay as discussed in § 778.116. See also § 531.37(b) of this chapter.

§ 778.218 Pay for certain idle hours.

(a) *General rules.* Payments which are made for occasional periods when the employee is not at work due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, where the payments are in amounts approximately equivalent to the employee's normal earnings for a similar period of time, are not made as compensation for his hours of employment. Therefore, such payments may be excluded from the regular rate of pay under section 7(e)(2) of the Act and, for the same reason, no part of such payments may be credited toward overtime compensation due under the Act.

(b) *Limitations on exclusion.* This provision of section 7(e)(2) deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. Sundays may not be workdays in a particular plant, but this does not make them either "holidays" or "vacations," or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

(c) *Failure to provide work.* The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations where the employee would normally be working but for such a factor as machinery breakdown, failure of expected supplies to arrive, weather conditions affecting the ability of the employee to perform the work and similarly unpredictable obstacles beyond the control of the employer. The term does not include reduction in work schedule (as discussed in §§ 778.321 through 778.329), ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.

(d) *Other similar cause.* The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

§ 778.219 Pay for foregoing holidays and vacations.

(a) *Sums payable whether employee works or not.* As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday or vacation are not required to be included in the regular rate because they are not regarded as compensation for working. Suppose an employee who is entitled to such a paid idle holiday or paid vacation foregoes his holiday or vacation and performs work for the employer on the holiday or during the vacation period. If, under the terms of his employment, he is entitled to a certain sum as holiday or vacation pay, whether he works or not, and receives pay at his customary rate (or higher) in addition for each hour that he works on the holiday or vacation day, the certain sum allocable to holiday or vacation pay is still to be excluded from the regular rate. It is still not regarded as compensation for hours of work if he is otherwise compensated at his customary rate (or at a higher rate) for his work on such days. Since it is not compensation for work it may not be credited toward overtime compensation due under the Act. Two examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(1) An employee whose rate of pay is $5 an hour and who usually works a 6-day 48-hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings—$240. He foregoes his vacation and works 50 hours in the week in question. He is owed $250 as his total straight-time earnings for the week, and $240 in addition as his vacation pay. Under the statute he is owed an additional $25 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $5 per hour has not been increased by virtue of the payment of $240 vacation pay, but no part of the $240 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to $240 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that vacation pay will be measured by straight-time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an

employee whose employment contract provides $240 vacation pay.)

(2) An employee who is entitled under his employment contract to 8 hours' pay at his rate of $5 an hour for the Christmas holiday, foregoes his holiday and works 9 hours on that day. During the entire week he works a total of 50 hours. He is paid under his contract, $250 as straight-time compensation for 50 hours plus $40 as idle holiday pay. He is owed, under the statute, an additional $25 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $5 per hour has not been increased by virtue of the holiday pay but no part of the $40 holiday pay may be credited toward statutory overtime compensation due.

(b) *Premiums for holiday work distinguished.* The example in paragraph (a)(2) of this section should be distinguished from a situation in which an employee is entitled to idle holiday pay under the employment agreement only when he is actually idle on the holiday, and who, if he foregoes his holiday also, under his contract, foregoes his idle holiday pay.

(1) The typical situation is one in which an employee is entitled by contract to 8 hours' pay at his rate of $5 an hour for certain named holidays when no work is performed. If, however, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of $7.50 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, $67.50 (9×$7.50) for the holiday work and $205 for the other 41 hours worked in the week, a total of $272.50. Under the statute (which does not require premium pay for a holiday) he is owed $275 for a workweek of 50 hours at a rate of $5 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium under section 7(e)(6), and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of $2.50 to meet the statutory requirements. (For a discussion of holiday premiums see § 778.203.)

(2) If all other conditions remained the same but the contract called for the payment of $10 (double time) for each hour worked on the holiday, the employee would receive, under his contract $90 (9×$10) for the holiday work in addition to $205 for the other 41 hours worked, a total of $295. Since this holiday premium is also an overtime premium under section 7(e)(6), it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Act. In distinguishing this situation from that in the example in paragraph (a)(2) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In example (2) the employee received a total of $85 attributable to the holiday: 8 hours' idle holiday pay at $5 an hour, due him whether he worked or not, and $45 pay at the nonholiday rate for 9 hours' work on the holiday. In the situation discussed in this paragraph the employee received $90 pay for working on the holiday—double time for 9 hours of work. Thus, clearly, all of the pay in this situation is paid for and directly related to the number of hours worked on the holiday.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7312, Jan. 23, 1981]

§ 778.220 "Show-up" or "reporting" pay.

(a) *Applicable principles.* Under some employment agreements, an employee may be paid a minimum of a specified number of hours' pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has been scheduled to work, he is not provided with the expected amount of work. The amounts that may be paid under such an agreement over and above what the employee would receive if paid at his customary rate only for the number of hours worked are paid to compensate the employee for the time wasted by him in reporting for work and to prevent undue loss of pay resulting from the employer's failure to provide expected work during regular hours. One of the primary purposes of such an arrangement is to discourage employers from calling their employees in to work for only a fraction of a day when they might get full-time work elsewhere. Pay arrangements of this kind are commonly referred to as "show-up" or "reporting" pay. Under the principles and subject to the conditions set forth in Subpart B of this part and §§ 778.201 through 778.207, that portion of such payment which represents compensation at the applicable rates for the straight time or overtime hours actually worked, if any, during such period may be credited as straight time or overtime compensation, as the case may be, in computing overtime compensation due under the Act. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

(b) *Application illustrated.* To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid $5 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive, making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the $10 earned in the 2 hours of work on Monday but an extra 2 hours' "show-up" pay, or $10 by reason of this agreement. However, since this $10 in "show-up" pay is not regarded as compensation for hours worked, the employee's regular rate remains $5 and the overtime requirements of the Act are satisfied if he receives, in addition to the $210 straight-time pay for 42 hours and the $10 "show-up" payment, the sum of $5 as extra compensation for the 2 hours of overtime work on Saturday.

[46 FR 7312, Jan. 23, 1981]

§ 778.221 "Call-back" pay.

(a) *General.* In the interest of simplicity and uniformity, the principles discussed in § 778.220 are applied also with respect to typical minimum "call-back" or "call-out" payments made pursuant to employment agreements. Typically, such minimum payments consist of a specified number of hours' pay at the applicable straight time or overtime rates which an employee receives on infrequent and sporadic occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work.

(b) *Application illustrated.* The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of $5 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or $22.50, under the call-back provision, in addition to $200 for working his regular schedule and $7.50 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to $215 pay at the $5 rate for all these hours, he has received under the agreement a premium of $2.50 for the 1 overtime hour on Monday and of $5 for the 2 hours of overtime work on the call, plus an extra sum of $7.50 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of $7.50) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra $7.50 received under the call-back provision is not regarded as paid for hours worked; therefore, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains $5, and he has received an overtime premium of $2.50 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7313, Jan. 23, 1981]

§ 778.222 Other payments similar to "call-back" pay.

The principles discussed in §§ 778.220 and 778.221 are also applied with respect to certain types of extra payments which are similar to call-back pay, such as: (a) Extra payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule; and (b) extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period." The extra payment, over and above the employee's earnings for the hours actually worked at his applicable rate (straight time or overtime, as the case may be), is considered as a payment that is not made for hours worked.

§ 778.223 Pay for non-productive hours distinguished.

Under the Act an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include (a) all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in Part 785 of this chapter (interpretative bulletin on "hours worked") and Part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as "payments not for hours worked." Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of "payments made for occasional periods when no work is performed due to * * * failure of the employer to provide sufficient work, or other similar cause" as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of $5 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is not of a type excludable under section 7(e)(2). The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.

[46 FR 7313, Jan. 23, 1981]

§ 778.224 "Other similar payments".

(a) *General*. The preceding sections have enumerated and discussed the basic types of payments for which exclusion from the regular rate is specifically provided under section 7(e)(2) because they are not made as compensation for hours of work. Section 7(e) (2) also authorizes exclusion from the regular rate of "other similar payments to an employee which are not made as compensation for his hours of employment." Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be "similar" in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

(b) *Examples of other excludable payments*. A few examples may serve to illustrate some of the types of payments intended to be excluded as "other similar payments":

(1) Sums paid to an employee for the rental of his truck or car.

(2) Loans or advances made by the employer to the employee.

(3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities.

TALENT FEES IN THE RADIO AND TELEVISION INDUSTRY

§ 778.225 Talent fees excludable under regulations.

Section 7(e)(3) provides for the exclusion from the regular rate of "talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs." Regulations defining "talent fees" have been issued as Part 550 of this chapter. Payments which accord with this definition are excluded from the regular rate.

Subpart D—Special Problems

INTRODUCTORY

§ 778.300 Scope of subpart.

This subpart applies the principles of computing overtime to some of the problems that arise frequently.

CHANGE IN THE BEGINNING OF THE WORKWEEK

§ 778.301 Overlapping when change of workweek is made.

As stated in § 778.105, the beginning of the workweek may be changed for an employee or for a group of employees if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. A change in the workweek necessarily results in a situation in which one or more hours or days fall in both the "old" workweek as previously constituted and the "new" workweek. Thus, if the workweek in the plant commenced at 7 a.m. on Monday and it is now proposed to begin the workweek at 7 a.m. on Sunday, the hours worked from 7 a.m. Sunday to 7 a.m. Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.

§ 778.302 Computation of overtime due for overlapping workweeks.

(a) *General rule.* When the beginning of the workweek is changed, if the hours which fall within both "old" and "new" workweeks as explained in § 778.301 are hours in which the employee does no work, his statutory compensation for each workweek is, of course, determinable in precisely the same manner as it would be if no overlap existed. If, on the other hand, some of the employee's working time falls within hours which are included in both workweeks, the Department of Labor, as an enforcement policy, will assume that the overtime requirements of section 7 of the Act have been satisfied if computation is made as follows:

(1) Assume first that the overlapping hours are to be counted as hours worked only in the "old" workweek and not in the new; compute straight time and overtime compensation due for each of the 2 workweeks on this basis and total the two sums.

(2) Assume now that the overlapping hours are to be counted as hours worked only in the new workweek and not in the old, and complete the total computation accordingly.

(3) Pay the employee an amount not less than the greater of the amounts computed by methods (1) and (2).

(b) *Application of rule illustrated.* Suppose that, in the example given in § 778.301, the employee, who receives $5 an hour and is subject to overtime pay after 40 hours a week, worked 5 hours on Sunday, March 7, 1965. Suppose also that his last "old" workweek commenced at 7 a.m. on Monday, March 1, and he worked 40 hours March 1 through March 5 so that for the workweek ending March 7 he would be owed straight time and overtime compensation for 45 hours. The proposal is to commence the "new" workweek at 7 a.m. on March 7. If in the "new" workweek of Sunday, March 7, through Saturday, March 13, the employee worked a total of 40 hours, including the 5 hours worked on Sunday, it is obvious that the allocation of the Sunday hours to the old workweek will result in higher total compensation to the employee for the 13-day period. He should, therefore, be paid $237.50 (40×$5+5×$7.50) for the period of March 1 through March 7, and $175 (35×$5) for the period of March 8 through March 13.

(c) *Nonstatutory obligations unaffected.* The fact that this method of compensation is permissible under the Fair Labor Standards Act when the beginning of the workweek is changed will not alter any obligation the employer may have under his employment contract to pay a greater amount of overtime compensation for the period in question.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

ADDITIONAL PAY FOR PAST PERIOD

§ 778.303 Retroactive pay increases.

Where a retroactive pay increase is awarded to employees as a result of collective bargaining or otherwise, it operates to increase the regular rate of pay of the employees for the period of its retroactivity. Thus, if an employee is awarded a retroactive increase of 10 cents per hour, he is owed, under the Act, a retroactive increase of 15 cents for each overtime hour he has worked during the period, no matter what the agreement of the parties may be. A retroactive pay increase in the form of a lump sum for a particular period must be prorated back over the hours of the period to which it is allocable to determine the resultant increases in the regular rate, in precisely the same manner as a lump sum bonus. For a discussion of the method of allocating bonuses based on employment in a prior period to the workweeks covered by the bonus payment, see § 778.209.

HOW DEDUCTIONS AFFECT THE REGULAR RATE

§ 778.304 Amounts deducted from cash wages—general.

(a) The word "deduction" is often loosely used to cover reductions in pay resulting from several causes:

(1) Deductions to cover the cost to the employer of furnishing "board, lodging or other facilities," within the meaning of section 3(m) of the Act.

(2) Deductions for other items such as tools and uniforms which are not regarded as "facilities."

(3) Deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishments).

(4) Reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule.

(5) Deductions for disciplinary reasons.

(b) In general, where such deductions are made, the employee's "regular rate" is the same as it would have been if the occasion for the deduction had not arisen. Also, as explained in Part 531 of this chapter, the requirements of the Act place certain limitations on the making of some of the above deductions.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

§ 778.305 Computation where particular types of deductions are made.

The regular rate of pay of an employee whose earnings are subject to deductions of the types described in paragraphs (a) (1), (2), and (3) of § 778.304 is determined by dividing his total compensation (except statutory exclusions) before deductions by the total hours worked in the workweek. (See also §§ 531.36–531.40 of this chapter.)

§ 778.306 Salary reductions in short workweeks.

(a) The reductions in pay described in § 778.304(a)(4) are not, properly speaking, "deductions" at all. If an employee is compensated at a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for all practical purposes, employed at an hourly rate of pay. This hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate. If an employee is hired at a fixed salary of $200 for a 40-hour week, his hourly rate is $5. When he works only 36 hours he is therefore entitled to $180. The employer makes a "deduction" of $20 from his salary to achieve this result. The regular hourly rate is not altered.

(b) When an employee is paid a fixed salary for a workweek of variable hours (or a guarantee of pay under the provisions of section 7(f) of the Act, as discussed in §§ 778.402 through 778.414), the understanding is that the salary or guarantee is due the employee in short workweeks as well as in longer ones and "deductions" of this type are not made. Therefore, in cases where the understanding of the parties is not clearly shown as to whether a fixed salary is intended to cover a fixed or a variable workweek the practice of making "deductions" from the salary for hours not worked in short weeks will be considered strong, if not conclusive, evidence that the salary covers a fixed workweek.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

§ 778.307 Disciplinary deductions.

Where deductions as described in § 778.304(a)(5) are made for disciplinary reasons, the regular rate of an employee is computed before deductions are made, as in the case of deductions of the types in paragraphs (a) (1), (2), and (3) of § 778.304. Thus where disciplinary deductions are made from a piece-worker's earnings, the earnings at piece rates must be totaled and divided by the total hours worked to determine the regular rate before the deduction is applied. In no event may such deductions (or deductions of the type described in § 778.304(a)(2)) reduce the earnings to an average below the applicable minimum wage or cut into any part of the overtime compensation due the employee. For a full discussion of the limits placed on such deductions, see Part 531 of this chapter. The principles set forth therein with relation to deductions have no application, however, to situations involving refusal or failure to pay the full amount of wages due. See Part 531 of this chapter; also § 778.306. It should be noted that although an employer may penalize an employee for lateness subject to the limitations stated above by deducting a half hour's straight time pay from his wages, for example, for each half hour, or fraction thereof of his lateness, the employer must still count as hours worked all the time actually worked by the employee in determining the amount of overtime compensation due for the workweek.

[46 FR 7314, Jan. 23, 1981]

LUMP SUM ATTRIBUTED TO OVERTIME

§ 778.308 The overtime rate is an hourly rate.

(a) Section 7(a) of the Act requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is a rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium under section 7(e)(5), (6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour (subject to certain statutory exceptions discussed in §§ 778.400 through 778.421).

(b) To qualify under section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as one and one-third, one and one-half or two times that rate. To qualify under section 7(e) (6) or (7), the overtime rate may not be less than one and one-half times the bonafide rate established in good faith for like work performed during nonovertime hours. Thus, it may not be less than time and one-half but it may be more. It may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least one and one-half times the nonovertime rate for example, if the nonovertime rate is $5 per hour, the overtime rate may not be less than $7.50 but may be set at a higher arbitrary figure such as $8 per hour.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7314, Jan. 23, 1981]

§ 778.309 Fixed sum for constant amount of overtime.

Where an employee works a regular fixed number of hours in excess of the statutory maximum each workweek, it is, of course, proper to pay him, in addition to his compensation for nonovertime hours, a fixed sum in any such week for his overtime work, determined by multiplying his overtime rate by the number of overtime hours regularly worked.

§ 778.310 Fixed sum for varying amounts of overtime.

A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per hour basis. For example, an agreement that provides for the payment of a flat sum of $75 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee's straight time rate is $5 an hour and the employee always works less than 10 hours on Sunday. Likewise, where an agreement provides for the payment for work on Sunday of either the flat sum of $75 or time and one-half the employee's regular rate for all hours worked on Sunday, whichever is greater, the $75 guaranteed payment is not an overtime premium. The reason for this is clear. If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated. For this reason, where extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due.

[46 FR 7314, Jan. 23, 1981]

§ 778.311 Flat rate for special job performed in overtime hours.

(a) *Flat rate is not an overtime premium.* The same reasoning applies where employees are paid a flat rate for a special job performed during overtime hours, without regard to the time actually consumed in performance. (This situation should be distinguished from "show-up" and "call-back" pay situations discussed in §§ 778.220-778.222 and from payment at a rate not less than one and one-half times the applicable rate to pieceworkers for work performed during overtime hours, as discussed in §§ 778.415 through 778.421). The total amount paid must be included in the regular rate; no part of the amount may be credited toward statutory overtime compensation due.

(b) *Application of rule illustrated.* It may be helpful to give a specific example illustrating the result of paying an employee on the basis under discussion.

(1) An employment agreement calls for the payment of $5 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of $7.50 per hour for work during hours outside the basic workday or workweek. It further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours' pay at the rate of $7.50 per hour (a total payment of $45) regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

(2) Suppose an employee under such an agreement works the following schedule:

	M	T	W	T	F	S	S
Hours within basic workday	8	8	7	8	8	0	0
Pay under contract	$40	$40	$35	$40	$40	0	0
Hours outside basic workday	2	2[1]	1	0	0	4	0
Pay under contract	$15	$45	$7.50	0	0	$30	0

[1] Hours spent in the performance of special work.

(3) To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, which qualify for exclusion under section 7(e)(7) of the Act, as discussed in § 778.204. The $15 paid on Monday, the $7.50 paid on Wednesday and the $30 paid on Saturday are paid pursuant to rates which qualify as premium rates under section 7(e)(7) of the Act. The total extra compensation (over the straight time pay for these hours) provided by these premium rates is $17.50. The sum of $17.50 should be subtracted from the total of $292.50 due the employee under the employment agreement. No part of the $45 payment for the special work performed on Tuesday qualifies for exclusion. The remaining $275 must thus be divided by 48 hours to determine the regular rate—$5.73 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—$22.92. The extra compensation in the amount of $17.50 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the $22.92 owed as statutory overtime premiums. No part of the $45 payment may be so credited. The employer must pay the employee an additional $5.42 as statutory overtime pay—a total of $297.92 for the week.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7315, Jan. 23, 1981]

BEST DOCUMENT AVAILABLE

"Task" Basis of Payment

§ 778.312 Pay for task without regard to actual hours.

(a) Under some employment agreements employees are paid according to a job or task rate without regard to the number of hours consumed in completing the task. Such agreements take various forms but the two most usual forms are the following:

(1) It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 "hours" of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the "hours" so credited and at one and one-half times such rate for the "hours" so credited in excess of 40. The number of "hours" credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. "Overtime" may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours.

(2) A similar task is set up and 8 hours' pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or "task" hours (or combination thereof) for which he received pay at the established rate. "Overtime" pay under this plan may be due after 20 hours of work, 25 or any other number up to 40.

(b) These employees are in actual fact compensated on a daily rate of pay basis. In plans of the first type, the established hourly rate never controls the compensation which any employee actually receives. Therefore, the established rate cannot be his regular rate. In plans of the second type the rate is operative only for the slower employees who exceed the time allotted to complete the task; for them it operates in a manner similar to a minimum hourly guarantee for piece workers, as discussed in § 778.111. On such days as it is operative it is a genuine rate; at other times it is not.

(c) Since the premium rates (at one and one-half times the established hourly rate) are payable under both plans for hours worked within the basic or normal workday (if one is established) and without regard to whether the hours are or are not in excess of 8 per day or 40 per week, they cannot qualify as overtime premiums under section 7(e) (5), (6), or (7) of the Act. They must therefore be included in the regular rate and no part of them may be credited against statutory overtime compensation due. Under plans of the second type, however, where the pay of an employee on a given day is actually controlled by the established hourly rate (because he fails to complete the task in the 8-hour period) and he is paid at one and one-half times the established rate for hours in excess of 8 hours actually worked, the premium rate paid on that day will qualify as an overtime premium under section 7(e)(5).

§ 778.313 Computing overtime pay under the Act for employees compensated on task basis.

(a) An example of the operation of a plan of the second type discussed in § 778.312 may serve to illustrate the effects on statutory overtime computations of payment on a task basis. Assume the following facts: The employment agreement establishes a basic hourly rate of $5 per hour, provides for the payment of $7.50 per hour for overtime work (in excess of the basic workday or workweek) and defines the basic workday as 8 hours, and the basic workweek as 40 hours, Monday through Friday. It further provides that the assembling of a machine constitutes a day's work. An employee who completes the assembling job in less than 8 hours will be paid 8 hours' pay at the established rate of $5 per hour and will receive pay at the "overtime" rate for hours worked after the completion of the task. An employee works the following hours in a particular week:

	M	T	W	T	F	S	S
Hours spent on task	6	7	7	9	8½	6	0
Day's pay under contract	$40	$40	$40	$40	$40	$60	0
Additional hours	2	0	2	0	½	0	0
Additional pay under contract	$15	0	$15	$7.50	$7.50	0	0

(b) In the example in paragraph (a) of this section the employee has actually worked a total of 48 hours and is owed under the contract a total of $305 for the week. The only sums which can be excluded as overtime premiums from this total before the regular rate is determined are the extra $2.50 payments for the extra hour on Thursday and Friday made because of work actually in excess of 8 hours. The payment of the other premium rates under the contract is either without regard to whether or not the hours they compensated were in excess of a bona fide daily or weekly standard or without regard to the number of overtime hours worked. Thus only the sum of $5 is excluded from the total. The remaining $300 is divided by 48 hours to determine the regular rate—$6.25 per hour. One-half this rate is due under the Act as extra compensation for each of the 8 overtime hours—$25. The $5 payment under the contract for actual excess hours may be credited and the balance—$20—is owed in addition to the $305 due under the contract.

[46 FR 7315, Jan. 23, 1981]

§ 778.314 Special situations.

There may be special situations in which the facts demonstrate that the hours for which contract overtime compensation is paid to employees working on a "task" or "stint" basis actually qualify as overtime hours under section 7(e) (5), (6), or (7). Where this is true, payment of one and one-half times an agreed hourly rate for "task" or "stint" work may be equivalent to payment pursuant to agreement of one and one-half time a piece rate. The alternative methods of overtime pay computation permitted by section 7(g) (1) or (2), as explained in §§ 778.415 through 778.421 may be applicable in such a case.

EFFECT OF FAILURE TO COUNT OR PAY FOR CERTAIN WORKING HOURS

§ 778.315 Payment for all hours worked in overtime workweek is required.

In determining the number of hours for which overtime compensation is due, all hours worked (see § 778.223) by an employee for an employer in a particular workweek must be counted. Overtime compensation, at a rate not less than one and one-half times the regular rate of pay, must be paid for each hour worked in the workweek in excess of the applicable maximum hours standard. This extra compensation for the excess hours of overtime work under the Act cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid.

§ 778.316 Agreements or practices in conflict with statutory requirements are ineffective.

While it is permissible for an employer and an employee to agree upon different base rates of pay for different types of work, it is settled under the Act that where a rate has been agreed upon as applicable to a particular type of work the parties cannot lawfully agree that the rate for that work shall be lower merely because the work is performed during the statutory overtime hours, or during a week in which statutory overtime is worked. Since a lower rate cannot lawfully be set for overtime hours it is obvious that the parties cannot lawfully agree that the working time will not be paid for at all. An agreement that only the first 8 hours of work on any

BEST DOCUMENT AVAILABLE

days or only the hours worked between certain fixed hours of the day or only the first 40 hours of any week will be counted as working time will clearly fail of its evasive purpose. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be compensated unless authorized in advance, will not impair the employee's right to compensation for work which he is actually suffered or permitted to perform.

§ 778.317 Agreements not to pay for certain nonovertime hours.

An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation. An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, $5 an hour for the first 35 hours, nothing for the hours between 35 and 40 and $7.50 an hour for the hours in excess of 40 would not meet the overtime requirements of the Act. Under the principles set forth in § 778.315, the employee would have to be paid $25 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the Act. Unless the employee is first paid $5 for each nonovertime hour worked, the $7.50 per hour payment purportedly for overtime hours is not in fact an overtime payment.

[46 FR 7315, Jan. 23, 1981]

§ 778.318 Productive and nonproductive hours of work.

(a) *Failure to pay for nonproductive time worked.* Some agreements provide for payment only for the hours spent in productive work; the work hours spent in waiting time, time spent in travel on the employer's behalf or similar nonproductive time are not made compensable and in some cases are neither counted nor compensated. Payment pursuant to such an agreement will not comply with the Act; such nonproductive working hours must be counted and paid for.

(b) *Compensation payable for nonproductive hours worked.* The parties may agree to compensate nonproductive hours worked at a rate (at least the minimum) which is lower than the rate applicable to productive work. In such a case, the regular rate is the weighted average of the two rates, as discussed in § 778.115 and the employee whose maximum hours standard is 40 hours is owed compensation at his regular rate for all of the first 40 hours and at a rate not less than one and one-half times this rate for all hours in excess of 40. (See § 778.415 for the alternative method of computing overtime pay on the applicable rate.) In the absence of any agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours up to 40 and at a rate at least one and one-half times that rate for hours in excess of 40.

(c) *Compensation attributable to both productive and nonproductive hours.* The situation described in paragraph (a) of this section is to be distinguished from one in which such nonproductive hours are properly counted as working time but no special hourly rate is assigned to such hours because it is understood by the parties that the other compensation received by the employee is intended to cover pay for such hours. For example, while it is not proper for an employer to agree with his pieceworkers that the hours spent in down-time (waiting for work) will not be paid for or will be neither paid for nor counted, it is permissible for the parties to agree that the pay the employees will earn at piece rates is intended to compensate them for all hours worked, the productive as well as the nonproductive hours. If this is the agreement of the parties, the regular rate of the pieceworker will be the rate determined by dividing the total piecework earnings by the total hours worked (both productive and nonproductive) in the workweek. Extra compensation (one-half the rate as so determined) would, of course, be due for each hour worked in excess of the applicable maximum hours standard.

EFFECT OF PAYING FOR BUT NOT COUNTING CERTAIN HOURS

§ 778.319 Paying for but not counting hours worked.

In some contracts provision is made for payment for certain hours, which constitute working time under the Act, coupled with a provision that these hours will not be counted as working time. Such a provision is a nullity. If the hours in question are hours worked, they must be counted as such in determining whether more than the applicable maximum hours have been worked in the workweek. If more hours have been worked, the employee must be paid overtime compensation at not less than one and one-half times his regular rate for all overtime hours. A provision that certain hours will be compensated only at straight time rates is likewise invalid. If the hours are actually hours worked in excess of the applicable maximum hours standard, extra half-time compensation will be due regardless of any agreement to the contrary.

§ 778.320 Hours that would not be hours worked if not paid for.

In some cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement of the parties will be respected, if reasonable.

(a) *Parties have agreed to treat time as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Parties have agreed not to treat time as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see Parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

[46 FR 7315, Jan. 23, 1981]

REDUCTION IN WORKWEEK SCHEDULE WITH NO CHANGE IN PAY

§ 778.321 Decrease in hours without decreasing pay—general.

Since the regular rate of pay is the average hourly rate at which an employee is actually employed, and since this rate is determined by dividing his total remuneration for employment (except statutory exclusions) for a given workweek by the total hours worked in that workweek for which such remuneration was paid, it necessarily follows that if the schedule of hours is reduced while the pay remains the same, the regular rate has been increased.

§ 778.322 Reducing the fixed workweek for which a salary is paid.

If an employee whose maximum hours standard is 40 hours was hired at a salary of $200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $5 per hour. If his workweek is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn $200, so that he earns his salary at the average rate of $5.71 per hour. His regular rate thus becomes $5.71 per hour; it is no longer $5 an hour. Overtime pay is due under the Act only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of $200 now covers 35 hours of work and no more, the employee would be owed $5.71 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times $5.71 ($8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive $5.71 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid. Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours—$200, 5 hours' pay at $5.71 per hour for the 5 hours between 35 and 40—$28.55, and 1 hour's pay at $8.57 for the 1 hour in excess of 40—$8.57, or a total of $237.12 for the week.

[46 FR 7316, Jan. 23, 1981]

§ 778.323 Effect if salary is for variable workweek.

The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives $200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is $5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains $7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discussion of the effect of deductions on the regular rate, see §§ 778.304 to 778.307.)

[46 FR 7316, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

§ 778.324 Effect on hourly rate employees.

A similar situation is presented where employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek. If the workweek is reduced from 40 to 35 hours without reduction in total pay, the average hourly rate is thereby increased as in § 778.322. If the reduction in work schedule is accompanied by a new agreement altering the mode of compensation from an hourly rate basis to a fixed salary for a variable workweek up to 40 hours, the results described in § 778.323 follow.

§ 778.325 Effect on salary covering more than 40 hours' pay.

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains $5 per hour and he is due, in addition to his salary, extra compensation of $2.50 for each hour over 40 but not over 55 and full time and one-half, or $7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is $5.50 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $5.50 per hour for the hours not worked.

[46 FR 7316, Jan. 23, 1981]

§ 778.326 Reduction of regular overtime workweek without reduction of take-home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of $5 an hour and regularly worked 50 hours, earning $275 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from $5 per hour to $6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be $285. The parties cannot, however, agree that the employee is to receive exactly $285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

[46 FR 7316, Jan. 23, 1981]

§ 778.327 Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate at $6 per hour for all workweeks in which the employee worked 40 hours or less, approximately $5.93 per hour for workweeks of 41 hours, approximately $5.86 for workweeks of 42 hours, approximately $5.45 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime at these "rates") $6 an hour regardless of the number of overtime hours worked. This is an obvious bookkeeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See Walling v. Green Head Bit & Supply Co., 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, $6 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide $6 rate usually working 50 hours and taking home $330 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to $7.65 for such weeks so that their total compensation is $328.95 for a 42-hour week the question may properly be asked, when they return to the 50-hour week, whether the $6 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra $1.05 or is their "regular" rate really now $7.65 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

[46 FR 7317, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

§ 778.328 Plan for gradual permanent reduction in schedule.

In some cases, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek from say, 48 hours to 40 hours, an agreement is entered into with a view to lessening the shock caused by the expected reduction in take-home wages. The agreement may provide for a rising scale of rates as the workweek is gradually reduced. The varying rates established by such agreement will be recognized as bona fide in the weeks in which they are respectively operative provided that (a) the plan is bona fide and there is no effort made to evade the overtime requirements of the Act; (b) there is a clear downward trend in the duration of the workweek throughout the period of the plan even though fluctuations from week-to-week may not be constantly downward; and (c) the various rates are operative for substantial periods under the plan and do not vary from week-to-week in accordance with the number of hours which any particular employee or group happens to work.

§ 778.329 Alternating workweeks of different fixed lengths.

In some cases an employee is hired on a salary basis with the understanding that his weekly salary is intended to cover the fixed schedule of hours (and no more) and that this fixed schedule provides for alternating workweeks of different fixed lengths. For example, many offices operate with half staff on Saturdays and, in consequence, employees are hired at a fixed salary covering a fixed working schedule of 7 hours a day Monday through Friday and 5 hours on alternate Saturdays. The parties agree that extra compensation is to be paid for all hours worked in excess of the schedule in either week at the base rate for hours between 35 and 40 in the short week and at time and one-half such rate for hours in excess of 40 in all weeks. Such an arrangement results in the employee's working at two different rates of pay—one thirty-fifth of the salary in short workweeks and one-fourtieth of the salary in the longer weeks. If the provisions of such a contract are followed, if the nonovertime hours are compensated in full at the applicable regular rate in each week and overtime compensation is properly computed for hours in excess of 40 at time and one-half the rate applicable in the particular workweek, the overtime requirements of the Fair Labor Standards Act will be met. While this situation bears some resemblance to the one discussed in § 778.327 there is this significant difference; the arrangement is permanent, the length of the respective workweeks and the rates for such weeks are fixed on a permanent-schedule basis far in advance and are therefore not subject to the control of the employer and do not vary with the fluctuations in business. In an arrangement of this kind, if the employer required the employee to work on Saturday in a week in which he was scheduled for work only on the Monday through Friday schedule, he would be paid at his regular rate for all the Saturday hours in addition to his salary.

PRIZES AS BONUSES

§ 778.330 Prizes or contest awards generally.

All compensation (except statutory exclusions) paid by or on behalf of an employer to an employee as remuneration for employment must be included in the regular rate, whether paid in the form of cash or otherwise. Prizes are therefore included in the regular rate if they are paid to an employee as remuneration for employment. If therefore it is asserted that a particular prize is not to be included in the regular rate, it must be shown either that the prize was not paid to the employee for employment, or that it is not a thing of value which is part of wages.

§ 778.331 Awards for performance on the job.

Where a prize is awarded for the quality, quantity or efficiency of work done by the employee during his customary working hours at his normal assigned tasks (whether on the employer's premises or elsewhere) it is obviously paid as additional remuneration for employment. Thus prizes paid for cooperation, courtesy, efficiency, highest production, best attendance, best quality of work, greatest number of overtime hours worked, etc., are part of the regular rate of pay. If the prize is paid in cash, the amount paid must be allocated (for the method of allocation see § 778.209) over the period during which it was earned to determine the resultant increase in the average hourly rate for each week of the period. If the prize is merchandise, the cost to the employer is the sum which must be allocated. Where the prize is either cash or merchandise, with the choice left the employee, the amount to be allocated is the amount (or the cost) of the actual prize he accepts.

§ 778.332 Awards for activities not normally part of employee's job.

(a) Where the prize is awarded for activities outside the customary working hours of the employee, beyond the scope of his customary duties or away from the employer's premises, the question of whether the compensation is remuneration for employment will depend on such factors as the amount of time, if any, spent by the employee in competing, the relationship between the contest activities and the usual work of the employee, whether the competition involves work usually performed by other employees for employers, whether an employee is specifically urged to participate or led to believe that he will not merit promotion or advancement unless he participates.

(b) By way of example, a prize paid for work performed in obtaining new business for an employer would be regarded as remuneration for employment. Although the duties of the employees who participate in the contest may not normally encompass this type of work, it is work of a kind normally performed by salesmen for their employers, and the time spent by the employee in competing for such a prize (whether successfully or not) is working time and must be counted as such in determining overtime compensation due under the Act. On the other hand a prize or bonus paid to an employee when a sale is made by the company's sales representative to a person whom he recommended as a good sales prospect would not be regarded as compensation for services if in fact the prizewinner performed no work in securing the name of the sales prospect and spent no time on the matter for the company in any way.

§ 778.333 Suggestion system awards.

The question has been raised whether awards made to employees for suggestions submitted under a suggestion system plan are to be regarded as part of the regular rate. There is no hard and fast rule on this point as the term "suggestion system" has been used to describe a variety of widely differing plans. It may be generally stated, however, that prizes paid pursuant to a bona fide suggestion system plan may be excluded from the regular rate at least in situations where it is the fact that:

(a) The amount of the prize has no relation to the earnings of the employee at his job but is rather geared to the value to the company of the suggestion which is submitted; and

(b) The prize represents a bona fide award for a suggestion which is the result of additional effort or ingenuity unrelated to and outside the scope of the usual and customary duties of any employee of the class eligible to participate and the prize is not used as a substitute for wages; and

(c) No employee is required or specifically urged to participate in the suggestion system plan or led to believe that he will not merit promotion or advancement (or retention of his existing job) unless he submits suggestions; and

(d) The invitation to employees to submit suggestions is general in nature and no specific assignment is outlined to employees (either as individuals or as a group) to work on or develop; and

(e) There is no time limit during which suggestions must be submitted; and

(f) The employer has, prior to the submission of the suggestion by an employee, no notice or knowledge of the fact that an employee is working on the preparation of a suggestion under circumstances indicating that the company approved the task and the schedule of work undertaken by the employee.

Subpart E—Exceptions From the Regular Rate Principles

COMPUTING OVERTIME PAY ON AN "ESTABLISHED" RATE

§ 778.400 The provisions of section 7(g)(3) of the Act.

Section 7(g)(3) of the Act provides the following exception from the provisions of section 7(a):

> (g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—
>
> * * * * *
>
> (3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

§ 778.401 Regulations issued under section 7(g)(3).

Regulations issued pursuant to section 7(g) (3) of the Act are published as Part 548 of this chapter. Payments made in conformance with these regulations satisfy the overtime pay requirements of the Act.

GUARANTEED COMPENSATION WHICH INCLUDES OVERTIME PAY

§ 778.402 The statutory exception provided by section 7(f) of the Act.

Section 7(f) of the Act provides the following exception from the provisions of section 7(a):

> (f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than 60 hours based on the rates so specified.

§ 778.403 Constant pay for varying workweeks including overtime is not permitted except as specified in section 7(f).

Section 7(f) is the only provision of the Act which allows an employer to pay the same total compensation each week to an employee who works overtime and whose hours of work vary from week to week. (See in this connection the discussion in §§ 778.207, 778.321-778.329, and 778.308-778.315.) Unless the pay arrangements in a particular situation meet the requirements of section 7(f) as set forth, all the compensation received by the employee under a guaranteed pay plan is included in his regular rate and no part of such guaranteed pay may be credited toward overtime compensation due under the Act. Section 7(f) is an exemption from the overtime provisions of the Act. No employer will be exempt from the duty of computing overtime compensation for an employee under section 7(a) unless the employee is paid pursuant to a plan which actually meets all the requirements of the exemption. These requirements will be discussed separately in the ensuing sections.

§ 778.404 Purposes of exemption.

The exception to the requirements of section 7(a) provided by section 7(f) of the Act is designed to provide a means whereby the employer of an employee whose duties necessitate irregular hours of work and whose total wages if computed solely on an hourly rate basis would of necessity vary widely from week to week, may guarantee the payment, week-in, week-out, of at least a fixed amount based on his regular hourly rate. Section 7(f) was proposed and enacted in 1949 with the stated purpose of giving express statutory validity, subject to prescribed limitations, to a judicial "gloss on the Act" by which an exception to the usual rule as to the actual regular rate had been recognized by a closely divided Supreme Court as permissible with respect to employment in such situations under so-called "Belo" contracts. See McComb v. Utica Knitting Co., 164 F. 2d 670, rehearing denied 164 F. 2d 678 (C.A. 2); Walling v. A. H. Belo Co., 316 U.S. 624; Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17; 95 Cong. Rec. 11893, 12365, 14938, A2396, A5233, A5476. Such a contract affords to the employee the security of a regular weekly income and benefits the employer by enabling him to anticipate and control in advance at least some part of his labor costs. A guaranteed wage plan also provides a means of limiting overtime computation costs so that wide leeway is provided for working employees overtime without increasing the cost to the employer, which he would otherwise incur under the Act for working employees in excess of the statutory maximum hours standard. Recognizing both the inherent advantages and disadvantages of guaranteed wage plans, when viewed in this light, Congress sought to strike a balance between them which would, on the one hand, provide a feasible method of guaranteeing pay to employees who needed this protection without, on the other hand, nullifying the overtime requirements of the Act. The provisions of section 7(f) set forth the conditions under which, in the view of Congress, this may be done. Plans which do not meet these conditions were not thought to provide sufficient advantage to the employee to justify Congress in relieving employers of the overtime liability section 7(a).

§ 778.405 What types of employees are affected.

The type of employment agreement permitted under section 7(f) can be made only with (or by his representatives on behalf of) an employee whose "duties * * * necessitate irregular hours of work." It is clear that no contract made with an employee who works a regularly scheduled workweek or whose schedule involves alternating fixed workweeks will qualify under this subsection. Even if an employee does in fact work a variable workweek, the question must still be asked whether his duties necessitate irregular hours of work. The subsection is not designed to apply in a situation where the hours of work vary from week to week at the discretion of the employer or the employee, nor to a situation where the employee works an irregular number of hours according to a predetermined schedule. The nature of the employee's duties must be such that neither he nor his employer can either control or anticipate with any degree of certainty the number of hours he must work from week to week. Furthermore, for the reasons set forth in § 778.406, his duties must necessitate significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours. Some examples of the types of employees whose duties may necessitate irregular hours of work would be outside buyers, on-call servicemen, insurance adjusters, newspaper reporters and photographers, propmen, script girls and others engaged in similar work in the motion picture industry, firefighters, troubleshooters and the like. There are some employees in these groups whose hours of work are conditioned by factors beyond the control of their employer or themselves. However, the mere fact that an employee is engaged in one of the jobs just listed, for example, does not mean that his duties necessitate irregular hours. It is always a question of fact whether the particular employee's duties do or do not necessitate irregular hours. Many employees not listed here may qualify. Although office employees would not ordinarily qualify, some office employees whose duties compel them to work variable hours could also be in this category. For example, the confidential secretary of a top executive whose hours of work are irregular and unpredictable might also be compelled by the nature of her duties to work variable and unpredictable hours. This would not ordinarily be true of a stenographer or file clerk, nor would an employee who only rarely or in emergencies is called upon to work outside a regular schedule qualify for this exemption.

§ 778.406 Nonovertime hours as well as overtime hours must be irregular if section 7(f) is to apply.

Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours for which the Supreme Court found the so-called "Belo" contracts appropriate and so fails to meet the requirements of section 7(f) which were designed to validate, subject to express statutory limitations, contracts of a like kind in situations of the type considered by the Court (see § 778.404). Nothing in the legislative history of section 7(f) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed. Section 7(a) was specifically designed to deal with such a situation by making such regular resort to overtime more costly to the employer and thus providing an inducement to spread the work rather than to impose additional overtime work on employees regularly employed for a workweek of the maximum statutory length. The "security of a regular weekly income" which the Supreme Court viewed as an important feature of the "Belo" wage plan militating against a holding that the contracts were invalid under the Act is, of course, already provided to employees who regularly work at least the maximum number of hours permitted without overtime pay under section 7(a). Their situation is not comparable in this respect to employees whose duties cause their weekly hours to fluctuate in such a way that some workweeks are short and others long and they cannot, without some guarantee, know in advance whether in a particular workweek they will be entitled to pay for the regular number of hours of nonovertime work contemplated by section 7(a). It is such employees whose duties necessitate "irregular hours" within the meaning of section 7(f) and whose "security of a regular weekly income" can be assured by a guarantee under that section which will serve to increase their hourly earnings in short workweeks under the statutory maximum hours. It is this benefit to the employee that the Supreme Court viewed, in effect, as a quid pro quo which could serve to balance a relaxation of the statutory requirement, applicable in other cases, that any overtime work should cost the employer 50 percent more per hour. In the enactment of section 7(f), as in the enactment of section 7(b) (1) and (2), the benefits that might inure to employees from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not "irregular" within the purport of section 7(f) and a payment plan lacking this factor does not qualify for the exemption. (See Goldberg v. Winn-Dixie Stores (S.D. Fla.), 15 WH Cases 641; Wirtz v. Midland Finance Co. (N.D. Ga.), 16 WH Cases 141; Trager v. J. E. Plastics Mfg. Co. (S.D.N.Y.), 13 WH Cases 621; McComb v. Utica Knitting Co., 164 F. 2d 670; Foremost Dairies v. Wirtz, 381 F. 2d 653 (C.A. 5).)

§ 778.407 The nature of the section 7(f) contract.

Payment must be made "pursuant to a bona fide individual contract or pursuant to an agreement made as a result of collective bargaining by representatives of employees." It cannot be a onesided affair determinable only by examination of the employer's books. The employee must not only be aware of but must have agreed to the method of compensation in advance of performing the work. Collective bargaining agreements in general are formal agreements which have been reduced to writing, but an individual employment contract may be either oral or written. While there is no requirement in section 7(f) that the agreement or contract be in writing, it is certainly desirable to reduce the agreement to writing, since a contract of this character is rather complicated and proof both of its existence and of its compliance with the various requirements of the section may be difficult if it is not in written form. Furthermore, the contract must be "bona fide." This implies that both the making of the contract and the settlement of its terms were done in good faith.

§ 778.408 The specified regular rate.

(a) To qualify under section 7(f), the contract must specify "a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable)." The word "regular" describing the rate in this provision is not to be treated as surplusage. To understand the nature of this requirement it is important to consider the past history of this type of agreement in the courts. In both of the two cases before it, the Supreme Court found that the relationship between the hourly rate specified in the contract and the amount guaranteed was such that the employee in a substantial portion of the workweeks of the period examined by the court worked sufficient hours to earn in excess of the guaranteed amount and in those workweeks was paid at the specified hourly rate for the first 40 hours and at time and one-half such rate for hours in excess of 40 (Walling v. A. H. Belo Company, 316 U.S. 624, and Walling v. Halliburton Oil Well Cementing Company, 331 U.S.17). The fact that section 7(f) requires that a contract, to qualify an employee for exemption under section 7(f), must specify a "regular rate," indicates that this criterion of these two cases is still important.

(b) The regular rate of pay specified in the contract may not be less than the applicable minimum rate. There is no requirement, however, that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into. The specified regular rate may be any amount (at least the applicable minimum wage) which the parties agree to and which can reasonably be expected to be operative in controlling the employee's compensation.

(c) The rate specified in the contract must also be a "regular" rate which is operative in determining the total amount of the employee's compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of $5 per hour in addition to which he has received a cost-of-living bonus of $7 a week and a 2-percent commission on sales which averaged $70 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of $5 per hour and guarantees $200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the "regular rate" as defined in section 7(e). It is also apparent that the $5 rate specified in the contract is not a "regular rate" under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

(d) In order to qualify as a "regular rate" under section 7(f) the rate specified in the contract together with the guarantee must be the actual measure of the regular wages which the employee receives. However, the payment of extra compensation, over and above the guaranteed amount, by way of extra premiums for work on holidays, or for extraordinarily excessive work (such as for work in excess of 16 consecutive hours in a day, or for work in excess of 6 consecutive days of work), year-end bonuses and similar payments which are not regularly paid as part of the employee's usual wages, will not invalidate a contract which otherwise qualifies under section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7317, Jan. 23, 1981]

§ 778.409 Provision for overtime pay.

The section 7(f) contract must provide for compensation at not less than one and one-half times the specified regular rate for all hours worked in excess of the applicable maximum hours standard for the particular workweek. All excessive hours, not merely those covered by the guarantee, must be compensated at one and one-half times (or a higher multiple) of the specified regular rate. A contract which guaranteed a weekly salary of $169, specified a rate of $3.60 per hour, and provided that not less than one and one-half times such rate would be paid only for all hours up to and including 46⅔ hours would not qualify under this section. The contract must provide for payment at time and one-half (or more) for all hours in excess of the applicable maximum hours standard in any workweek. A contract may provide a specific overtime rate greater than one and one-half times the specified rate, for example, double time. If it does provide a specific overtime rate it must provide that such rate will be paid for all hours worked in excess of the applicable maximum hours standard.

[46 FR 7317, Jan. 23, 1981]

§ 778.410 The guaranty under section 7(f).

(a) The statute provides that the guaranty must be a weekly guaranty. A guaranty of monthly, semimonthly, or biweekly pay (which would allow averaging wages over more than one workweek) does not qualify under this paragraph. Obviously guarantees for periods less than a workweek do not qualify. Whatever sum is guaranteed must be paid in full in all workweeks, however short in which the employee performs any amount of work for the employer. The amount of the guaranty may not be subject to proration or deduction in short weeks.

(b) The contract must provide a guaranty of pay. The amount must be specified. A mere guaranty to provide work for a particular number of hours does not qualify under this section.

(c) The pay guaranteed must be "for not more than 60 hours based on the rate so specified."

§ 778.411 Sixty-hour limit on pay guaranteed by contract.

The amount of weekly pay guaranteed may not exceed compensation due at the specified regular rate for the applicable maximum hours standard and at the specified overtime rate for the additional hours, not to exceed a total of 60 hours. Thus, if the maximum hours standard is 40 hours and the specified regular rate is $5 an hour the weekly guaranty cannot be greater than $350. This does not mean that an employee employed pursuant to a guaranteed pay contract under this section may not work more than 60 hours in any week; it means merely that pay in an amount sufficient to compensate for a greater number of hours cannot be covered by the guaranteeed pay. If he works in excess of 60 hours he must be paid, for each hour worked in excess of 60, overtime compensation as provided in the contract, in addition to the guaranteed amount.

[46 FR 7317, Jan. 23, 1981]

§ 778.412 Relationship between amount guaranteed and range of hours employee may be expected to work.

While the guaranteed pay may not cover more than 60 hours, the contract may guarantee pay for a lesser number of hours. In order for a contract to qualify as a bona fide contract for an employee whose duties necessitate irregular hours of work, the number of hours for which pay is guaranteed must bear a reasonable relation to the number of hours the employee may be expected to work. A guaranty of pay for 60 hours to an employee whose duties necessitate irregular hours of work which can reasonably be expected to range no higher than 50 hours would not qualify as a bona fide contract under this section. The rate specified in such a contract would be wholly fictitious and therefore would not be a "regular rate" as discussed above. When the parties enter into a guaranteed pay contract, therefore, they should determine, as far as possible, the range of hours the employee is likely to work. In deciding the amount of the guaranty they should not choose a guaranty of pay to cover the maximum number of hours which the employee will be likely to work at any time but should rather select a figure low enough so that it may reasonably be expected that the rate will be operative in a significant number of workweeks. In both Walling v. A. H. Belo Co., 316 U.S. 624 and Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17 the court found that the employees did actually exceed the number of hours (60 and 84 respectively) for which pay was guaranteed on fairly frequent occasions so that the hourly rate stipulated in the contract in each case was often operative and did actually control the compensation received by the employees. In cases where the guaranteed number of hours has not been exceeded in a significant number of workweeks, this fact will be weighed in the light of all the other facts and circumstances pertinent to the agreement before reaching a conclusion as to its effect on the validity of the pay arrangement. By a periodic review of the actual operation of the contract the employer can determine whether a stipulated contract rate reasonably expected by the parties to be operative in a significant number of workweeks is actually so operative or whether adjustments in the contract are necessary to ensure such an operative rate.

§ 778.413 Guaranty must be based on rates specified in contract.

The guaranty of pay must be "based on the rate so specified," in the contract. If the contract specifies a regular rate of $5 and an overtime rate of $7.50 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be $275, if it is to be based on the rates so specified. A guaranty of $290 in such a situation would not, obviously, be based on the rates specified in the contract. Moreover, a contract which provides a variety of different rates for shift differentials, arduous or hazardous work, stand-by time, piece-rate incentive bonuses, commissions or the like in addition to a specified regular rate and a specified overtime rate with a guaranty of pay of, say, $290 from all sources would not qualify under this section, since the guaranty of pay in such a case is not based on the regular and overtime rates specified in the contract.

[46 FR 7318, Jan. 23, 1981]

§ 778.414 "Approval" of contracts under section 7(f).

(a) There is no requirement that a contract, to qualify under section 7(f), must be approved by the Secretary of Labor or the Administrator. The question of whether a contract which purports to qualify an employee for exemption under section 7(f) meets the requirements is a matter for determination by the courts. This determination will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder. It will turn on the question of whether the duties of the employee in fact necessitate irregular hours, whether the rate specified in the contract is a "regular rate"—that is, whether it was designed to be actually operative in determining the employee's compensation—whether the contract was entered into in good faith, whether the guaranty of pay is in fact based on the regular and overtime rates specified in the contract. While the Administrator does have the authority to issue an advisory opinion as to whether or not a pay arrangement accords with the requirements of section 7(f) he can do so only if he has knowledge of these facts.

(b) As a guide to employers, it may be helpful to describe a fact situation in which the making of a guaranteed salary contract would be appropriate and to set forth the terms of a contract which would comply, in the circumstances described, with the provisions of section 7(f).

Example: An employee is employed as an insurance claims adjuster; because of the fact that he must visit claimants and witnesses at their convenience, it is impossible for him or his employer to control the hours which he must work to perform his duties. During the past 6 months his weekly hours of work have varied from a low of 30 hours to a high of 58 hours. His average workweek for the period was 48 hours. In about 80 percent of the workweeks he worked less than 52 hours. It is expected that his hours of work will continue to follow this pattern. The parties agree upon a regular rate of $5 per hour. In order to provide for the employee the security of a regular weekly income the parties further agree to enter into a contract which provides a weekly guaranty of pay. If the applicable maximum hours standard is 40 hours, guaranty of pay for a workweek somewhere between 48 hours (his average week) and 52 would be reasonable. In the circumstances described the following contract would be appropriate:

The X Company hereby agrees to employ John Doe as a claims adjuster at a regular hourly rate of pay of $5 per hour for the first 40 hours in any workweek and at the rate of $7.50 per hour for all hours in excess of 40 in any workweek, with a guarantee that John Doe will receive, in any week in which he performs any work for the company, the sum of $275 as total compensation, for all work performed up to and including 50 hours in such workweek.

(c) The situation described in paragraph (b) of this section is merely an example and nothing herein is intended to imply that contracts which differ from the example will not meet the requirements of section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7318, Jan. 23, 1981]

Computing Overtime Pay on the Rate Applicable to the Type of Work Performed in Overtime Hours (Secs. 7(g) (1) and (2))

§ 778.415 The statutory provisions.

Sections 7(g) (1) and (2) of the Act provide:

> (g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—
>
> (1) In the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or
>
> (2) In the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours;
>
> * * * * *
>
> and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

§ 778.416 Purpose of provisions.

The purpose of the provisions set forth in § 778.415 is to provide an exception from the requirement of computing overtime pay at not less than one and one-half times the regular rate for hours worked in excess of the applicable maximum hours standard for a particular workweek and to allow, under specified conditions, a simpler method of computing overtime pay for employees paid on the basis of a piece rate, or at a variety of hourly rates or piece rates, or a combination thereof. This provision is not designed to exclude any group of employees from the overtime benefits of the Act. The intent of the provision is merely to simplify the method of computation while insuring the receipt by the affected employees of substantially the same amount of overtime compensation.

§ 778.417 General requirements of section 7(g).

The following general requirements must be met in every case before the overtime computation authorized under section 7(g)(1) or (2) may be utilized.

(a) First, in order to insure that the method of computing overtime pay permitted in this section will not in any circumstances be seized upon as a device for avoiding payment of the minimum wage due for each hour, the requirement must be met that employee's average hourly earnings for the workweek (exclusive of overtime pay and of all other pay which is excluded from the regular rate) are not less than the minimum. This requirement insures that the employer cannot pay subminimum nonovertime rates with a view to offsetting part of the compensation earned during the overtime hours against the minimum wage due for the workweek.

(b) Second, in order to insure that the method of computing overtime pay permitted in this section will not be used to circumvent or avoid the payment of proper overtime compensation due on other sums paid to employees, such as bonuses which are part of the regular rate, the section requires that extra overtime compensation must be properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

§ 778.418 Pieceworkers.

(a) Under section 7(g)(1), an employee who is paid on the basis of a piece rate for the work performed during nonovertime hours may agree with his employer in advance of the performance of the work that he shall be paid at a rate not less than one and one-half times this piece rate for each piece produced during the overtime

BEST DOCUMENT AVAILABLE

hours. No additional overtime pay will be due under the Act provided that the general conditions discussed in § 778.417 are met and:

(1) The piece rate is a bona fide rate;

(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7);

(3) The number of overtime hours for which such overtime piece rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard for the particular workweek; and

(4) The compensation paid for the overtime hours is at least equal to pay at one and one-half times the applicable minimum rate for the total number of hours worked in excess of the applicable maximum hours standard.

(b) The piece rate will be regarded as bona fide if it is the rate actually paid for work performed during the nonovertime hours and if it is sufficient to yield at least the minimum wage per hour.

(c) If a pieceworker works at two or more kinds of work for which different straight time piece rates have been established, and if by agreement he is paid at a rate not less than one and one-half whichever straight time piece rate is applicable to the work performed during the overtime hours, such piece rate or rates must meet all the tests set forth in this section and the general tests set forth in § 778.417 in order to satisfy the overtime requirements of the Act under section 7(g) (2).

§ 778.419 Hourly workers employed at two or more jobs.

(a) Under section 7(g)(2) an employee who performs two or more different kinds of work, for which different straight time hourly rates are established, may agree with his employer in advance of the performance of the work that he will be paid during overtime hours at a rate not less than one and one-half times the hourly nonovertime rate established for the type of work he is performing during such overtime hours. No additional overtime pay will be due under the act provided that the general requirements set forth in § 778.417 are met and;

(1) The hourly rate upon which the overtime rate is based in a bona fide rate;

(2) The overtime hours for which the overtime rate is paid qualify as overtime hours under section 7(e) (5), (6), or (7); and

(3) The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard.

(b) An hourly rate will be regarded as a bona fide rate for a particular kind of work it is equal to or greater than the applicable minimum rate therefor and if it is the rate actually paid for such work when performed during nonovertime hours.

§ 778.420 Combined hourly rates and piece rates.

Where an employee works at a combination of hourly and piece rates, the payment of a rate not less than one and one-half times the hourly or piece rate applicable to the type of work being performed during the overtime hours will meet the overtime requirements of the Act if the provisions concerning piece rates (as discussed in § 778.418) and those concerning hourly rates (as discussed in § 778.419) are respectively met.

§ 778.421 Offset hour for hour.

Where overtime rates are paid pursuant to statute or contract for hours in excess of 8 in a day, or in excess of the applicable maximum hours standard, or in excess of the employees' normal working hours or regular working hours (as under section 7(e)(5) or for work on "special days" (as under section 7(e)(6), or pursuant to an applicable employment agreement for work outside of the hours established in good faith by the agreement as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the applicable maximum hours standard) (under section 7(e) (7), the requirements of section 7(g) (1) and 7(g)(2) will be met if the number of such hours during which overtime rates were paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard for the particular workweek. It is not necessary to determine whether the total amount of compensation paid for such hours equals or exceeds the amount of compensation which would be due at the applicable rates for work performed during the hours after the applicable maximum in any workweek.

Subpart F—Pay Plans Which Circumvent the Act

DEVICES TO EVADE THE OVERTIME REQUIREMENTS

§ 778.500 Artificial regular rates.

(a) Since the term "regular rate" is defined to include all remuneration for employment (except statutory exclusions) whether derived from hourly rates, piece rates, production bonuses or other sources, the overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means. The established hourly rate is the "regular rate" to an employee only if the hourly earnings are the sole source of his compensation. Payment for overtime on the basis of an artificial "regular" rate will not result in compliance with the overtime provisions of the Act.

(b) It may be helpful to describe a few schemes that have been attempted and to indicate the pitfalls inherent in the adoption of such schemes. The device of the varying rate which decreases as the length of the workweek increases has already been discussed in §§ 778.321 through 778.329. It might be well however, to re-emphasize that the hourly rate paid for the identical work during the hours in excess of the applicable maximum hours standard cannot be lower than the rate paid for the nonovertime hours nor can the hourly rate vary from week to week inversely with the length of the workweek. It has been pointed out that, except in limited situations under contracts which qualify under section 7(f), it is not possible for an employer lawfully to agree with his employees that they will receive the same total sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours (if any) worked in any workweek. The result cannot be achieved by the payment of a fixed salary or by the payment of a lump sum for overtime or by any other method or device.

(c) Where the employee is hired at a low hourly rate supplemented by facilities furnished by the employer, bonuses (other than those excluded under section 7(e)), commissions, pay ostensibly (but not actually) made for idle hours, or the like, his regular rate is not the hourly rate but is the rate determined by dividing his total compensation from all these sources in any workweek by the number of hours worked in the week. Payment of overtime compensation based on the hourly rate alone in such a situation would not meet the overtime requirements of the Act.

(d) One scheme to evade the full penalty of the Act was that of setting an arbitrary low hourly rate upon which overtime compensation at time and one-half would be computed for all hours worked in excess of the applicable maximum hours standard; coupled with this arrangement was a guarantee that if the employee's straight time and overtime compensation, based on this rate, fell short, in any week, of the compensation that would be due on a piece-rate basis of x cents per piece, the employee would be paid on the piece-rate basis instead. The hourly rate was set so low that it never (or seldom) was operative. This scheme was found by the Supreme Court to be violative of the overtime provisions of the Act in the case of Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 427. The regular rate of the employee involved was found to be the quotient of total piece-rate earnings paid in any week divided by the total hours worked in such week.

(e) The scheme is no better if the employer agrees to pay straight time and overtime compensation on the arbitrary hourly rates and to make up the difference between this total sum and the piece-rate total in the form of a bonus to each employee. (For further discussion of the refinements of this plan, see §§ 778.502 and 778.503.)

§ 778.501 The "split-day" plan.

(a) Another device designed to evade the overtime requirements of the Act was a plan known as the "Poxon" or "split-day" plan. Under this plan the normal or regular workday is artificially divided into two portions one of which is arbitrarily labeled the "straight time" portion of the day and the other the "overtime" portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated as the regular rate: "time and one-half" based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of $5 per hour under a contract which provides for the payment of so-called "overtime" for all hours in excess of 4 per day. Thus, for the normal or regular 8-hour day the employee would receive $20 for the first 4 hours and $30 for the remaining 4 hours; and a total of $50 for 8 hours. (This is exactly what he would receive at the straight time rate of $6.25 per hour.) On the sixth 8-hour day the employee likewise receives $50 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at "overtime" rates for 20 hours of the workweek.

(b) Such a division of the normal 8-hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. The employee is not paid at the rate of $5 an hour and the alleged overtime rate of $7.50 per hour is not paid for overtime work. It is not geared either to hours "in excess of the employee's normal working hours or regular working hours" (section 7(e)(5) or for work "outside of the hours established in good faith * * * as the basic, normal, or regular workday" (section 7(e) (7)) and it cannot therefore qualify as an overtime rate. The regular rate of pay of the employee in this situation is $6.25 per hour and he is owed additional overtime compensation, based on this rate, for all hours in excess of the applicable maximum hours standard. This rule was settled by the Supreme Court in the case of Walling v. Helmerich & Payne, 323 U.S. 37, and its validity has been reemphasized by the definition of the term "regular rate" in section 7(e) of the Act as amended.

[46 FR 7318, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

PSEUDO-BONUSES

§ 778.502 Artificially labeling part of the regular wages a "bonus".

(a) The term "bonus" is properly applied to a sum which is paid as an addition to total wages usually because of extra effort of one kind or another, or as a reward for loyal service or as a gift. The term is improperly applied if it is used to designate a portion of regular wages which the employee is entitled to receive under his regular wage contract.

(b) For example, if an employer has agreed to pay an employee $300 a week without regard to the number of hours worked, the regular rate of pay of the employee is determined each week by dividing the $300 salary by the number of hours worked in the week. The situation is not altered if the employer continues to pay the employee, whose applicable maximum hours standard is 40 hours, the same $300 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of $4.80 an hour, overtime compensation at $7.20 per hour and labels the balance a "bonus" (which will vary from week to week, becoming smaller as the hours increase and vanishing entirely in any week in which the employee works 55 hours or more). The situation is in no way bettered if the employer, standing by the logic of his labels, proceeds to compute and pay overtime compensation due on this "bonus" by prorating it back over the hours of the workweek. Overtime compensation has still not been properly computed for this employee at his regular rate.

(c) An illustration of how the plan works over a 3-week period may serve to illustrate this principle more clearly:

(1) In the first week the employee whose applicable maximum hours standard is 40 hours, works 40 hours and receives $300. The books show he has received $192 (40 hours×$4.80 an hour) as wages and $108 as bonus. No overtime has been worked so no overtime compensation is due.

(2) In the second week he works 45 hours and receives $300. The books show he has received $192 for the first 40 hours and $36 (5 hours×$7.20 an hour) for the 5 hours over 40, or a total of $228 as wages, and the balance as a bonus of $72. Overtime compensation is then computed by the employer by dividing $72 by 45 hours to discover the average hourly increase resulting from the bonus—$1.60 per hour—and half this rate is paid for the 5 overtime hours—$4. This is improper. The employee's regular rate in this week is $6.67 per hour. He is owed $316.85 not $304.

(3) In the third week the employee works 50 hours and is paid $300. The books show that the employee received $192 for the first 40 hours and $72 (10 hours×$7.20 per hour) for the 10 hours over 40, for a total of $264 and the balance as a bonus of $36. Overtime pay due on the "bonus" is found to be $3.60. This is improper. The employee's regular rate in this week is $6 and he is owed $330, not $303.60.

(d) Similar schemes have been devised for piece-rate employees. The method is the same. An employee is assigned an arbitrary hourly rate (usually the minimum) and it is agreed that his straight-time and overtime earnings will be computed on this rate but that if these earnings do not amount to the sum he would have earned had his earnings been computed on a piece-rate basis of "x" cents per piece, he will be paid the difference as a "bonus." The subterfuge does not serve to conceal the fact that this employee is actually compensated on a piece-rate basis, that there is no bonus and his regular rate is the quotient of piece-rate earnings divided by hours worked (Walling v. Youngerman-Reynolds Hardwood Company, 325 U.S. 419).

(e) The general rule may be stated that wherever the employee is guaranteed a fixed or determinable sum as his wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply.

[33 FR 986, Jan. 26, 1968; 33 FR 3172, Feb. 20, 1968, as amended at 46 FR 7318, Jan. 23, 1981]

§ 778.503 Pseudo "percentage bonuses."

As explained in § 778.210 of this part, a true bonus based on a percentage of total wages—both straight time and overtime wages—satisfies the Act's overtime requirements, if it is paid unconditionally. Such a bonus increases both straight time and overtime wages by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact. Some bonuses, however, although expressed as a percentage of both straight time and overtime wages, are in fact a sham. Such bonuses, like the bonuses described in § 778.502 of this part, are generally separated out of a fixed weekly wage and usually decrease in amount in direct proportion to increases in the number of hours worked in a week in excess of 40. The hourly rate purportedly paid under such a scheme is artificially low, and the difference between the wages paid at the hourly rate and the fixed weekly compensation is labeled a percentage of wage "bonus."

Example: An employer's wage records show an hourly rate of $5.62 per hour, and an overtime rate of one and one-half times that amount, or $8.43 per hour. In addition, the employer pays an alleged percentage of wage bonus on which no additional overtime compensation is paid:

Week 1—40 hours worked:	
40 hours at $5.62 per hour	$224.80
Percentage of total earnings bonus at 33.45% of $224.80	75.20
Total	300.00
Week 2—43 hours worked:	
40 hours at $5.62 per hour	224.80
3 hours at $8.43 per hour	25.29
Subtotal	250.09

BEST DOCUMENT AVAILABLE

Percentage of total earnings bonus at 19.96% of $250.09	49.91
Total	300.00
Week 3—48 hours worked:	
40 hours at $5.62 per hour	224.80
8 hours at $8.43 per hour	67.44
Subtotal	292.24
Percentage of total earnings bonus at 2.66% of $292.24	7.76
Total	300.00

This employee is in fact being paid no overtime compensation at all. The records in fact reveal that the employer pays exactly $300 per week, no matter how many hours the employee works. The employee's regular rate is $300 divided by the number of hours worked in the particular week, and his overtime compensation due must be computed as shown in § 778.114.

[46 FR 7319, Jan. 23, 1981]

Subpart G—Miscellaneous

§ 778.600 Veterans' subsistence allowances.

Subsistence allowances paid under Pub. L. 346 (commonly known as the G.I. bill of rights) to a veteran employed in on-the-job training program work may not be used to offset the wages to which he is entitled under the Fair Labor Standards Act. The subsistence allowances provided by Pub. L. 346 for payment to veterans are not paid as compensation for services rendered to an employer nor are they intended as subsidy payments for such employer. In order to qualify as wages under either section 6 or section 7 of the Act, sums paid to an employee must be paid by or on behalf of the employer. Since veterans' subsistence allowances are not so paid, they may not be used to make up the minimum wage or overtime pay requirements of the Act nor are they included in the regular rate of pay under section 7.

§ 778.601 Special overtime provisions available for hospital and residential care establishments under section 7(j).

(a) *The statutory provision.* Section 7(j) of the Act provides, for hospital and residential care establishment employment, under prescribed conditions, an exemption from the general requirement of section 7(a) that overtime compensation be computed on a workweek basis. It permits a 14-day period to be established for the purpose of computing overtime compensation by an agreement or understanding between an employer engaged in the operation of a hospital or residential care establishment, and any of his employees employed in connection therewith. The exemption provided by section 7(j) applies—

> if, pursuant to an agreement or understanding arrived at between the employer and employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive days for purposes of overtime computation and if, for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(b) *Conditions for application of exemption.* As conditions for use of the 14-day period in lieu of the workweek in computing overtime, section 7(j) requires, first, an agreement or understanding between the employer and the employee before performance of the work that such period is to be used, and second, the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate for all hours worked in excess of eight in any workday within such period and in excess of 80 during the period as a whole.

(c) *The agreement or understanding.* The agreement or understanding between the employer and employee to use the 14-day period for computing overtime must be entered into before the work to which it is intended to apply is performed. It may be arrived at directly with the employee or through his representative. It need not be in writing, but if it is not, a special record concerning it must be kept as required by Part 516 of this chapter. The 14-day period may begin at any hour of any day of the week; it need not commence at the beginning of a calendar day. It consists of 14 consecutive 24-hour periods, at the end of which a new 14-day period begins. The election to use the 14-day period in lieu of the workweek must, like selection of an employee's workweek

BEST DOCUMENT AVAILABLE

(§ 778.105) be with the intent to use such period permanently or for a substantial period of time. Changes from such period to the workweek and back again to take advantage of less onerous overtime pay liabilities with respect to particular work schedules under one system than under the other are not permissible.

(d) *Payment for overtime under the special provisions.* If the parties have the necessary agreement or understanding to use the 14-day period, computation of overtime pay on the workweek basis as provided in section 7(a) is not required so long as the employee receives overtime compensation at a rate not less than one and one-half times his regular rate of pay "for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period." Such compensation is required for all hours in such period in excess of eight in any workday or workdays therein which are worked by the employee, whether or not more than 80 hours are worked in the period. The first workday in the period, for purposes of this computation, begins at the same time as the 14-day period and ends 24 hours later. Each of the 13 consecutive 24-hour periods following constitutes an additional workday of the 14-day period. Overtime compensation at the prescribed time and one-half rate is also required for all hours worked in excess of 80 in the 14-day period, whether or not any daily overtime is worked during the first 80 hours. However, under the provisions of section 7(h) and 7(e)(5) of the Act, any payments at the premium rate for daily overtime hours within such period may be credited toward the overtime compensation due for overtime hours in excess of 80.

(e) *Use of 14-day period in lieu of workweek.* Where the 14-day period is used as authorized in section 7(j), such period is used in lieu of the workweek in computing the regular rate of pay of employees to whom it applies (i.e., those of the hospital's or residential care establishment's employees with whom the employer has elected to enter into the necessary agreement or understanding as explained in paragraph (c) of this section). With this exception, the computation of the regular rate and the application of statutory exclusions therefrom is governed by the general principles set forth in this Part 778.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7319, Jan. 23, 1981; 46 FR 33516, June 30, 1981]

§ 778.602 Special overtime provisions under section 7(b).

(a) *Daily and weekly overtime standards.* The general overtime pay requirements of the Act provide for such pay only when the number of hours worked exceeds the standard specified for the workweek; no overtime compensation on a daily basis is required. However, section 7 of the Act, in subsection (b), provides certain partial exemptions from the general overtime provisions, each of which is conditioned upon the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate of pay for his hours worked in the workweek in excess of daily, as well as weekly, standards specified in the subsection. Under these provisions, when an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which such an exemption is claimed, he must be paid at such overtime rate for all hours worked in the workweek in excess of the applicable daily maximum or in excess of the applicable weekly maximum, whichever number of hours is greater. Thus, if his total hours of work in the workweek which are in excess of the daily maximum are 10, and his hours in excess of the weekly maximum are 8, overtime compensation is required for 10 hours, not 8.

(b) *Standards under section 7(b).* The partial exemptions provided by section 7(b) apply to an employee under the conditions specified in clause (1), (2), or (3) of the subsection "if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." As an example, suppose an employee is employed under the other conditions specified for an exemption under section 7(b) at an hourly rate of $5.20 and works the following schedule:

Hours	M	T	W	T	F	S	S	Tot.
Worked	14	9	10	15	12	8	0	68

Number of overtime hours: Daily, 5 (hours over 12); weekly, 12 (hours over 56).

Since the weekly overtime hours are greater, the employee is entitled to pay for 12 hours at $7.80 an hour (1½×$5.20), a total of $93.60 for the overtime hours, and to pay at his regular rate for the remaining 56 hours (56×$5.20) in the amonut of $291.20 or a total of $384.80 for the week. If the employee had not worked the 8 hours on Saturday, his total hours worked in the week would have been 60, of which five were daily overtime hours, and there would have been no weekly overtime hours under the section 7(b) standard. For such a schedule the employee would be entitled to 5 hours of overtime pay at time and one-half (5×1½×$5.20=$39) plus the pay at his regular rate for the remaining 55 hours (55×$5.20=$286), making a total of $325 due him for the week.

(c) *Standards under section 7(c).* The partial exemption from the general overtime provisions provided by section 7(c) applies to an employee employed by an employer in work subject to such exemption "if such employee * * * receives compensation for employment by such employer in excess of 10 hours in any workday, or for employment by such employer in excess of 50 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." This may be illustrated by such an employee working the following schedule, whose regular hourly rate is $2.

Hours	M	T	W	T	F	S	S	Tot.
Worked	10	12	12	12	8	0	0	54

Number of overtime hours: Daily, 6 (hours over 10); weekly, 4 (hours over 50).

Since the daily overtime hours are greater, the employee must receive overtime compensation of $3 an hour for 6 hours (1 1/2 ×$2×6=$18) in addition to his pay at his regular rate for the remaining 48 hours ($2×48=$96) or a total of $114 for the week. If the employee had worked 12 hours instead of eight on Friday, making a total of 58 hours in the week, his daily overtime hours and weekly overtime hours for the week would be equal in number—8 hours for each—in which event $24 would be due for these overtime hours at the $3 rate and $100 would be due for the remaining 50 hours at the regular rate of $2, so that his total pay required for the week would be $124.

(d) *Standards under section 7(d).* The partial exemptions from the general overtime provisions provided by section 7(d) apply to an employee employed by an employer in work subject to such an exemption "if such employee * * * receives compensation for employment by such employer in excess of 10 hours in any workday, or for employment in excess of 48 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." To illustrate the application of this provision, assume that such an employee whose regular rate is $2 an hour works the following schedules:

Hours	M	T	W	T	F	S	S	Tot.
Worked	14	14	14	14	10	0	0	66

Number of overtime hours: Daily, 16 (hours over 10); weekly, 18 (hours over 48).

Hours	M	T	W	T	F	S	S	Tot.
Worked	16	14	14	14	6	0	0	64

Number of overtime hours: Daily, 18 (hours over 10); weekly, 16 (hours over 48).

Following the method of computation used in the examples in paragraphs (b) and (c) above of this section, the employee in the first of these weeks would be entitled to pay of $150 (18×1 1/2 ×$2=$54 for overtime plus 48×$2=$96), and in the second week must be paid $146 (18×1 1/2 ×$2=$54 for overtime plus 46×2=$92) in order to satisfy the requirements of section 7(d).

BEST DOCUMENT AVAILABLE

(e) *Application of section 7(a) in lieu of special provisions.* (1) An employer's agreement with his employees' collective bargaining representative under section 7(b) (1) or (2) must include a provision requiring payment, during the period covered by the agreement, for overtime in excess of 12 hours in a workday or 56 hours in a workweek as specified in section 7(b) if the exemption from the general overtime pay requirements of section 7(a) is to apply. See Cabunac v. National Terminals Corp., 139 F. 2d 853.

(2) Under section 7(b)(3) an employee otherwise qualified for the partial exemption in any workweek who does not receive the daily or weekly overtime compensation specified is required to be paid overtime compensation as prescribed in section 7(a).

(3) Under section 7(c) or 7(d), which operate only as partial exemptions from the overtime requirements of section 7(a), the fact that an employee otherwise subject to the exemption works overtime in excess of the specified daily hours on 1 or more days in the workweek will not make the employer liable for any payment at overtime rates if the employee's total hours of work in the workweek are not in excess of the maximum applicable to him under section 7(a). For example, an employee who works two 15-hour days in the workweek (30 hours) is not required to be paid for overtime on either a daily or a weekly basis under the Act. Different rules apply, however, to employees whose hours of work in a workweek exceed the maximum specified in section 7(a). These rules are discussed in paragraphs (e) (4) and (5) of this section.

(4) Whenever hours in excess of those specified in section 7(a) are worked by an employee in any workweek which has been selected for application of the provisions of section 7(c) or 7(d) to the employees at the establishment by which he is employed as described in § 526.10, § 526.11, or § 526.12 of this chapter (see also §§ 516.18-516.19 of this chapter), such employee, if otherwise qualified for application of section 7(c) or 7(d) to him, must be paid overtime compensation as required by the special standards of the applicable subsection. An employer who chooses to apply the partial overtime exemption provided therein to his operations at a particular establishment must apply the conditions prescribed by the applicable subsection to all his eligible employees, not otherwise exempt, who are employed there. Thus, if an employee otherwise qualified for the partial exemption provided by section 7(c) works three 15-hour days in a workweek selected by the employer for application of such exemption to employees in the establishment where the employee is employed, at least time-and-one-half overtime compensation must be paid him for the 15 hours he has worked in excess of the 10-hour daily standard prescribed in that subsection. The employer, having chosen the particular workweek for application of the exemption to his employees qualified therefor who are engaged in the work of the establishment, cannot avoid liability under the special overtime provisions of section 7(c) through the device of withdrawing his claim of exemption for an individual employee because in such workweek the hours worked by the employee happen to be such that section 7(a), if section 7(c) were not applicable, would be satisfied by the payment of a lesser amount of overtime compensation. Thus, in the example given, the Act and the applicable regulations do not permit the employer to satisfy his overtime obligation by electing to pay for 5 hours of weekly overtime under section 7(a) in lieu of the 15 hours of daily overtime under section 7(c). As stated in the Senate Report (S. Rept. No. 1487, 89th Cong. 2d sess., pp. 15, 16, 31) with respect to the provisions of section 7 (c) and (d), during the workweeks which they specify as "the maximum aggregate period of exemption available to an employer" the statute "will require compensation for hours worked in excess of" the daily or weekly hours specified in the applicable subsection which "must be at least 1½ times the regular rate of pay."

(5) In any workweek in which an employer is operating under such partial exemption at an establishment and in which the overtime compensation due an employee would be greater under section 7(a) than under the special

overtime provisions of such partial exemption, a failure by the employer to compensate the employee in accordance with the special provisions leaves the employer liable for the larger amount of overtime compensation required by section 7(a) in that week. For example, if an employee subject to the special overtime provisions of section 7(c) or 7(d) worked 11 hours on 1 day and 8 hours on each of 4 other days for a total of 43 hours in the workweek, failure to pay daily overtime compensation for 1 hour as required by the special provisions would leave the employer liable for an overtime payment for 3 overtime hours under section 7(a). This is so because these partial exemptions from the overtime requirements of section 7(a) are made conditional upon payment of overtime compensation in accordance with the special overtime provisions prescribed for the exemption and an employer who fails to make such payment is accordingly not relieved of his overtime obligation under section 7(a). See Wirtz v. Osceola Farms Co., 372 F. 2d 584 (C.A. 5); Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 298.

[33 FR 986, Jan. 26, 1968, as amended at 34 FR 144, Jan. 4, 1969; 46 FR 7319, Jan. 23, 1981]

PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS OF GOODS OR SERVICES

Subpart A—General

INTRODUCTORY

Sec.
779.0 Purpose of interpretative bulletin.
779.1 General scope of the Act.
779.2 Previous and new coverage.
779.3 Pay standards for employees subject to previous coverage of the Act.
779.4 Pay standards for newly covered employment.
779.5 Matters discussed in this part.
779.6 Matters discussed in other interpretative bulletins.

INTERPRETATIONS OF THE LAW

779.7 Significance of official interpretations.
779.8 Basic support for interpretations.
779.9 Reliance on interpretations.
Sec.
779.10 Interpretations made, continued, and superseded by this part.

SOME BASIC DEFINITIONS

779.11 General statement.
779.12 Commerce.
779.13 Production.
779.14 Goods.
779.15 Sale and resale.
779.16 State.
779.17 Wage and wage payments to tipped employees.
779.18 Regular rate.
779.19 Employer, employee, and employ.
779.20 Person.
779.21 Enterprise.
779.22 Enterprise engaged in commerce or in the production of goods for commerce.
779.23 Establishment.
779.24 Retail or service establishment.

Subpart B—Employment to Which the Act May Apply: Basic Principles and Individual Coverage

GENERAL PRINCIPLES

779.100 Basic coverage in general.
779.101 Guiding principles for applying coverage and exemption provisions.
779.102 Scope of this subpart.

EMPLOYEES ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE

779.103 Employees "engaged in commerce."
779.104 Employees "engaged in the production of goods for commerce."
779.105 Employees engaged in activities "closely related" and "directly essential" to the production of goods for commerce.
779.106 Employees employed by an independent employer.
779.107 Goods defined.
779.108 Goods produced for commerce.
779.109 Amount of activities which constitute engaging in commerce or in the production of goods for commerce.
779.110 Employees in retailing whose activities may bring them under the Act.
779.111 Buyers and their assistants.
779.112 Office employees.
779.113 Warehouse and stock room employees.
779.114 Transportation employees.
779.115 Watchmen and guards.
779.116 Custodial and maintenance employees.
779.117 Salesmen and sales clerks.
779.118 Employees providing central services for multi-unit organizations.
779.119 Exempt occupations.

BEST DOCUMENT AVAILABLE

Subpart C—Employment to Which the Act May Apply; Enterprise Coverage

ENTERPRISE; THE BUSINESS UNIT

Sec.
779.200 Coverage expanded by 1961 and 1966 amendments.
779.201 The place of the term "enterprise" in the Act.
779.202 Basic concepts of definition.
779.203 Distinction between "enterprise," "establishment," and "employer."
779.204 Common types of "enterprise."

RELATED ACTIVITIES

779.205 Enterprise must consist of "related activities."
779.206 What are "related activities."
779.207 Related activities in retail operations.
779.208 Auxiliary activities which are "related activities."
779.209 Vertical activities which are "related activities."
779.210 Other activities which may be part of the enterprise.
779.211 Status of activities which are not "related."

COMMON BUSINESS PURPOSE

779.212 Enterprise must consist of related activities performed for a "common business purpose."
779.213 What is a common business purpose.
779.214 "Business" purpose.

UNIFIED OPERATION OR COMMON CONTROL

779.215 General scope of terms.
779.216 Statutory construction of the terms.
779.217 "Unified operation" defined.
779.218 Methods to accomplish "unified operation."
779.219 Unified operation may be achieved without common control or common ownership.
779.220 Unified operation may exist as to separately owned or controlled activities which are related.
779.221 "Common control" defined.
779.222 Ownership as factor.
779.223 Control where ownership vested in individual or single organization.
779.224 Common control in other cases.

LEASED DEPARTMENTS, FRANCHISE AND OTHER BUSINESS ARRANGEMENTS

779.225 Leased departments.
779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.
Sec.
779.227 Conditions which must be met for exception.
779.228 Types of arrangements contemplated by exception.
779.229 Other arrangements.
779.230 Franchise and other arrangements.
779.231 Franchise arrangements which do not create a larger enterprise.
779.232 Franchise or other arrangements which create a larger enterprise.
779.233 Independent contractors performing work "for" an enterprise.
779.234 Establishments whose only regular employees are the owner or members of his immediate family.
779.235 Other "enterprises."

COVERED ENTERPRISES

779.236 In general.
779.237 Enterprise engaged in commerce or in the production of goods for commerce.
779.238 Engagement in described activities determined on annual basis.
779.239 Meaning of "engaged in commerce or in the production of goods for commerce."

EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS THAT HAVE BEEN MOVED IN OR PRODUCED FOR COMMERCE BY ANY PERSON

779.240 Employees "handling * * * or otherwise working on goods."
779.241 Selling.
779.242 Goods that "have been moved in" commerce.
779.243 Goods that have been "produced for commerce by any person."

COVERED RETAIL ENTERPRISE

779.244 "Covered enterprises" of interest to retailers of goods or services.
779.245 Conditions for coverage of retail or service enterprises.

INTERSTATE INFLOW TEST UNDER PRIOR ACT

779.246 Inflow test under section 3(s)(1) of the Act prior to 1966 amendments.
779.247 "Goods" defined.
779.248 Purchase or receive "goods for resale."
779.249 Goods which move or have moved across State lines.
779.250 Goods that have not lost their out-of-State identity.
779.251 Goods that have lost their out-of-State identity
779.252 Not in deliveries from the reselling establishment.
779.253 What is included in computing the total annual inflow volume.

BEST DOCUMENT AVAILABLE

The Gasoline Service Establishment Enterprise

Sec.
779.254 Summary of coverage and exemptions prior to and following the 1966 amendments.
779.255 Meaning of "gasoline service establishment."
779.256 Conditions for enterprise coverage of gasoline service establishments.
779.257 Exemption applicable to gasoline service establishments under the prior Act.

Annual Gross Volume of Sales Made or Business Done

779.258 Sales made or business done.
779.259 What is included in annual gross volume.
779.260 Trade-in allowances.

Excise Taxes

779.261 Statutory provision.
779.262 Excise taxes at the retail level.
779.263 Excise taxes not at the retail level.
779.264 Excise taxes separately stated.

Computing the Annual Volume

779.265 Basis for making computations.
779.266 Methods of computing annual volume of sales or business.
779.267 Fluctuations in annual gross volume affecting enterprise coverage and establishment exemptions.
779.268 Grace period of 1 month for computation.
779.269 Computations for a new business.

Subpart D—Exemptions for Certain Retail or Service Establishments

General Principles

779.300 Purpose of subpart.
779.301 Statutory provisions.

"Establishment" Basis of Exemptions

779.302 Exemptions depend on character of establishment.
779.303 "Establishment" defined; distinguished from "enterprise" and "business."
779.304 Illustrations of a single establishment.
779.305 Separate establishments on the same premises.
779.306 Leased departments not separate establishments.
779.307 Meaning and scope of "employed by" and "employee of."
779.308 Employed within scope of exempt business.
779.309 Employed "in" but not "by."
779.310 Employees of employers operating multi-unit businesses.
Sec.
779.311 Employees working in more than one establishment of same employer.

Statutory Meaning of Retail or Service Establishment

779.312 "Retail or service establishment", defined in section 13(a)(2).
779.313 Requirements summarized.

Making Sales of Goods and Services "Recognized As Retail"

779.314 "Goods and services" defined.
779.315 Traditional local retail or service establishments.
779.316 Establishments outside "retail concept" not within statutory definition; lack first requirement.
779.317 Partial list of establishments lacking "retail concept."
779.318 Characteristics and examples of retail or service establishments.
779.319 A retail or service establishment must be open to general public.
779.320 Partial list of establishments whose sales or service may be recognized as retail.
779.321 Inapplicability of "retail concept" to some types of sales or services of an eligible establishment.

"Recognized" As Retail "In the Particular Industry"

779.322 Second requirement for qualifying as a "retail or service establishment."
779.323 Particular industry.
779.324 Recognition "in."
779.325 Functions of the Secretary and the courts.
779.326 Sources of information.
779.327 Wholesale sales.
779.328 Retail and wholesale distinguished.
779.329 Effect of type of customer and type of goods or services.

Sales Not Made For Resale

779.330 Third requirement for qualifying as a "retail or service establishment."
779.331 Meaning of sales "for resale."
779.332 Resale of goods in an altered form or as parts or ingredients of other goods or services.
779.333 Goods sold for use as raw materials in other products.
779.334 Sales of services for resale.
779.335 Sales of building materials for residential or farm building construction.
779.336 Sales of building materials for commercial property construction.

General Tests of Exemption Under Section 13(a)(2)

779.337 Requirements of exemption summarized.

BEST DOCUMENT AVAILABLE

Sec.
779.338 Effect of 1961 and 1966 amendments.

SALES MADE WITHIN THE STATE

779.339 More than 50 percent intrastate sales required.
779.340 Out-of-State customers.
779.341 Sales "made within the State" and "engagement in commerce" distinguished.

COMPUTING ANNUAL DOLLAR VOLUME AND COMBINATION OF EXEMPTIONS

779.342 Methods of computing annual volume of sales.
779.343 Combinations of exemptions.

ENGAGING IN MANUFACTURING AND PROCESSING ACTIVITIES; SECTION 13(a)(4)

779.345 Exemption provided in section 13(a)(4).
779.346 Requirements for exemption summarized.
779.347 Exemption limited to "recognized retail establishment"; factories not exempt.
779.348 Goods must be made at the establishment which sells them.
779.349 The 85-percent requirement.
779.350 The section 13(a)(4) exemption does not apply to service establishments.

ENGAGING IN CONTRACT TELEGRAPH AGENCY OPERATIONS; SECTION 13(a)(11)

779.351 Exemption provided.
779.352 Requirements for exemption.

CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

779.353 Basis for classification.

LUMBER AND BUILDING MATERIALS DEALERS

779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.
779.355 Classification of lumber and building materials sales.
779.356 Application of exemptions to employees.

COAL DEALERS

779.357 May qualify as exempt 13(a)(2) establishments; classification of coal sales.

ICE MANUFACTURERS AND ICE DEALERS

779.358 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

LIQUEFIED-PETROLEUM-GAS AND FUEL OIL DEALERS

779.359 May qualify as exempt 13(a)(2) establishments.
779.360 Classification of liquefied-petroleum-gas sales.

Sec.
779.361 Classification of other fuel oil sales.

FEED DEALERS

779.362 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

MONUMENT DEALERS

779.363 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

FROZEN-FOOD LOCKER PLANTS

779.364 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

AUTOMOTIVE TIRE ESTABLISHMENTS

779.365 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.
779.366 Recapping or retreading tires for sale

COMMERCIAL STATIONERS

779.367 Commercial stationers may qualify as exempt 13(a)(2) establishments.
779.368 Printing and engraving establishments not recognized as retail.

FUNERAL HOMES

779.369 Funeral home establishments may qualify as exempt 13(a)(2) establishments.

CEMETERIES

779.370 Cemeteries may qualify as exempt 13(a)(2) establishments.

AUTOMOBILE, TRUCK, FARM IMPLEMENT, TRAILER, AND AIRCRAFT SALES AND SERVICES

779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).
779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

OTHER ESTABLISHMENTS FOR WHICH SPECIAL EXCEPTIONS OR EXEMPTIONS ARE PROVIDED

779.381 Establishments within special exceptions or exemptions.

HOTELS AND MOTELS

779.382 May qualify as exempt 13(a)(2) establishments.
779.383 "Hotel" and "motel" exemptions under section 13(b)(8).

MOTION PICTURE THEATERS

779.384 May qualify as exempt establishments.

BEST DOCUMENT AVAILABLE

SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS

Sec.
779.385 May qualify as exempt establishments.

RESTAURANTS AND ESTABLISHMENTS PROVIDING FOOD AND BEVERAGE SERVICE

779.386 Restaurants may qualify as exempt 13(a)(2) establishments.
779.387 "Restaurant" exemption under section 13(b)(8).
779.388 Exemption provided for food or beverage service employees.

Subpart E—Provisions Relating to Certain Employees of Retail or Service Establishments.

GENERAL PRINCIPLES

779.400 Purpose of subpart.

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

779.401 Statutory provision.
779.402 "Executive" and "administrative" employees defined.
779.403 Administrative and executive employees in covered enterprises employed in other than retail or service establishments.
779.404 Other section 13(a)(1) employees employed in covered enterprises.

STUDENTS, LEARNERS, AND HANDICAPPED WORKERS

779.405 Statutory provisions.
779.406 "Student-learners."
779.407 Learners other than "student-learners."
779.408 "Full-time students."
779.409 Handicapped workers.

EMPLOYEES COMPENSATED PRINCIPALLY BY COMMISSIONS

779.410 Statutory provision.
779.411 Employee of a "retail or service establishment."
779.412 Compensation requirements for overtime pay exemption under section 7(i).
779.413 Methods of compensation of retail store employees.
779.414 Types of employment in which this overtime pay exemption may apply.
779.415 Computing employee's compensation for the representative period.
779.416 What compensation "represents commissions."
779.417 The "representative period" for testing employee's compensation.
779.418 Grace period for computing portion of compensation representing commissions.

Sec.
779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's "regular rate" of pay.
779.420 Recordkeeping requirements.
779.421 Basic rate for computing overtime compensation of nonexempt employees receiving commissions.

Subpart F—Other Provisions Which May Affect Retail Enterprises

GENERAL

779.500 Purpose of subpart.

EQUAL PAY PROVISIONS

779.501 Statutory provisions.

CHILD LABOR PROVISIONS

779.502 Statutory provisions; regulations in Part 1500 of this title.
779.503 The retailer and section 12(a).
779.504 The retailer and section 12(c).
779.505 "Oppressive child labor" defined.
779.506 Sixteen-year minimum.
779.507 Fourteen-year minimum.
779.508 Eighteen-year minimum.

DRIVER OR DRIVER'S HELPER MAKING LOCAL DELIVERIES

779.509 Statutory provision.
779.510 Conditions that must be met for section 13(b)(11) exemption.
779.511 "Finding by Secretary."

RECORDS TO BE KEPT BY EMPLOYERS

779.512 The recordkeeping regulations.
779.513 Order and form of records.
779.514 Period for preserving records.
779.515 Regulations should be consulted.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201-219.

SOURCE: 35 FR 5856, Apr. 9, 1970, unless otherwise noted.

Subpart A—General

INTRODUCTORY

§ 779.0 Purpose of interpretative bulletin.

It is the purpose of this part to provide an official statement of the views of the Department of Labor with respect to the application and meaning of those provisions of the Fair Labor Standards Act, hereinafter referred to as the Act, which govern rights and obligations of employees and employers in the various enterprises in which retail sales of goods or services are made. The application of the Act to

BEST DOCUMENT AVAILABLE

employment in such enterprises was greatly broadened by amendments effective September 3, 1961. The Act's application was extended to employment in additional retail and service enterprises by the Fair Labor Standards Amendments of 1966, effective February 1, 1967. Under the amended Act, there are many employees employed by retail or service establishments and in enterprises having such establishments engaged in the retail selling of goods or services who must be employed in compliance with its provisions. It is an objective of this part to make available in one place, for the guidance of those who may be concerned with the provisions of the law, the official interpretations of these provisions by which the Department of Labor will be guided in carrying out its responsibilities under the Act.

§ 779.1 General scope of the Act.

The Fair Labor Standards Act of 1938, as amended, is a Federal statute of general application which establishes minimum wage, maximum hours, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. Employers and employees in enterprises in which retail sales of goods or services are made need to know how the Act applies to employment in these enterprises so that they may understand their rights and obligations under the law. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard and with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 779.2 Previous and new coverage.

Under the Act as amended in 1966, an employer may have some employees subject to its minimum wages, maximum hours, overtime pay, equal pay, or child labor provisions who would be covered by such provisions under the prior law even if the amendments had not been enacted, and other employees whose coverage under such provisions was provided for the first time by the 1966 amendments. As explained in Subparts B and C such provisions of the amended Act may apply to an employee by reason of the activities in which he is individually engaged, or because he is employed in an enterprise whose activities satisfy the conditions prescribed in the law prior to the amendments. On the other hand, such provisions of the amended Act may apply to an employee solely because he is employed in an enterprise whose activities satisfy only the conditions provided in the Act as it was amended in 1966. Previously covered employment in retail and service enterprise is subject to different monetary standards than newly covered employment in such enterprises until February 1, 1971. On and after that date, every such employee subject to the minimum wage provisions will be entitled to not less than $1.60 an hour. However, beginning February 1, 1969, every such employee subject to the overtime provisions is entitled to overtime pay for all hours worked in excess of 40 in a workweek at a rate not less than one and one-half times his regular rate of pay. During the period for which different minimum wage provisions were made applicable, beginning with the effective date of the 1966 amendments on February 1, 1967, and ending on January 31, 1971, a lower minimum wage rate is authorized for employees in employment brought under the minimum wage provisions of the Act for the first time by the amendments than for those subject to the minimum wage provisions under the prior Act. Also, in the period beginning with the effective date of the amendments and ending on January 31, 1969, employees in employment brought under the overtime pay provisions for the first time by the amendments could be employed for a longer workweek without overtime pay, as specified in the Act. Accordingly, employers who do not wish to pay all covered employees for employment during such periods the minimum wages and overtime pay required for employment covered under the prior provisions will need to identify those employees who are covered under the prior provisions and those who are covered under the new provisions when wages are computed and paid under the Act.

§ 779.3 Pay standards for employees subject to previous coverage of the Act.

Before the 1966 amendments, the Act applied, as it still applies, to employees individually engaged in interstate or foreign commerce or in the production of goods for such commerce, and to employees in certain enterprises, including enterprises in which retail sales of goods or services are made. The tests by which coverage based on the employee's individual activities is determined were not changed by the 1966 amendments and are described in Subpart B of this part. An employee in an enterprise whose activities satisfy the conditions prescribed in the law prior to the 1966 amendments (discussed in Subpart C) is covered under the present Act. Any employee whose employment satisfies the tests by which individual or enterprise coverage is determined under the Act prior to the 1966 amendments and who would not have come within some exemption in the law prior to the amendments is subject to the monetary provisions prescribed in the law for previously covered employees and is entitled to a minimum wage of at least $1.40 an hour beginning February 1, 1967, and not less than $1.60 an hour beginning February 1, 1968, unless expressly exempted by some provision of the amended Act. (In each instance where there is an increase in the minimum wage, the new minimum wage rate becomes effective 12:01 a.m., on the date indicated.) Such an employee is also entitled to overtime pay for hours worked in excess of 40 in any workweek at a rate not less than one and one-half times his regular rate of pay. (Minimum wage rates in Puerto Rico, the Virgin Islands, and American Samoa are governed by special provisions of the Act. Information on these rates is available at any office of the Wage and Hour Division.)

§ 779.4 Pay standards for newly covered employment.

There are many employees of retailers as well as other employees who would not be subject to the minimum wage or overtime pay provisions of the Act as it was prior to the 1966 amendments, either because of their individual activities or because of the activities of the enterprise in which they are employed, but who are brought under the minimum wage or overtime provisions, or both, for the first time by the changed enterprise coverage provisions or changes in exemptions, or both, which were enacted as part of the amendments and made effective February 1, 1967. The following pay standards apply to this newly covered employment, unless a specific exemption has been retained or provided in the amendments; such employees must be paid not less than the minimum wages for hours worked and not less than one and one-half times their regular rates of pay for overtime, as shown in the following schedule:

Minimum wage	Beginning
$1.00 an hour	February 1, 1967.
$1.15 an hour	February 1, 1968.
$1.30 an hour	February 1, 1969.
$1.45 an hour	February 1, 1970.
$1.60 an hour	February 1, 1971 and thereafter.

In each instance where there is an increase in the minimum wage, the new minimum wage rate becomes effective 12:01 a.m., on the date indicated. (Minimum wage rates for newly covered employees in Puerto Rico, the Virgin Islands, and American Samoa are set by wage order under special industry committee procedures. Information on these rates and their effective dates may be obtained at any office of the Wage and Hour Division.)

Overtime pay	Beginning
After 44 hours in a workweek	Feb. 1, 1967.
After 42 hours in a workweek	Feb. 1, 1968.

BEST DOCUMENT AVAILABLE

Overtime pay	Beginning
After 40 hours in a workweek and thereafter	Feb. 1, 1969.

In each instance where a new overtime pay standard is applicable, it shall be effective as to any workweek beginning on or after the date indicated.

§ 779.5 Matters discussed in this part.

This part discusses generally the provisions of the Act which govern its application to employers and employees in enterprises and establishments that make retail sales of goods or services. It discusses in some detail those provisions of the Act which refer specifically to such employers and employees and such enterprises or establishments. The criteria for determining the employments in which these employers and employees may be subject to the law are discussed in Subparts B and C of this part and the criteria for exclusion from its provisions under specific exemptions are discussed in Subpart D of this part. Other provisions of special interest to retailers and their employees are discussed in Subparts E and F of this part.

§ 779.6 Matters discussed in other interpretative bulletins.

Bulletins having general application to others subject to the law as well as to retailers and their employees have been issued on a number of subjects of general interest. These will be found in other parts of this chapter of the Code of Federal Regulations. Reference should be made to them for guidance on matters which they discuss in detail and which this part does not undertake to do. They include Part 776 of this chapter, discussing general coverage, including the employer-employee relationship under the Act; Part 531 of this chapter, discussing methods of payment of wages; Part 778 of this chapter, discussing computation and payment of overtime compensation; Part 785 of this chapter, discussing the calculation of hours worked; and Part 800 of this chapter, discussing equal pay for equal work.

INTERPRETATIONS OF THE LAW

§ 779.7 Significance of official interpretations.

The regulations in this part contain the official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

§ 779.8 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (Mitchell v. Zachry, 362 U.S. 310; Kirschbaum v. Walling, 316 U.S. 517). Court decisions supporting interpretations contained in this bulletin are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950; 15 FR 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions as constructed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

BEST DOCUMENT AVAILABLE

§ 779.9 Reliance on interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. In addition, the Supreme Court has recognized that such interpretations of the Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Further, as stated by the Court: "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (Skidmore v. Swift, 323 U.S. 134.) Some of the interpretations in Subpart D of this part relating to the scope of the exemption provided for retail or service establishments are interpretations of this exemption as it appeared in the original Act before amendment in 1949 and 1961, which have remained unchanged because they were consistent with the amendments. These interpretations may be said to have Congressional sanction because "When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended. 63 Stat. 920." (Mitchell v. Kentucky Finance Co., 359 U.S. 290.)

§ 779.10 Interpretations made, continued, and superseded by this part.

On and after publication of this part in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as Part 779 of this chapter. Prior opinions, rulings and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended by the Fair Labor Standards Amendments of 1961 are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met by retailers in the application of the Act. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional or District Office of the Division.

SOME BASIC DEFINITIONS

§ 779.11 General statement.

The meaning and application of the provisions of law discussed in this part depend in large degree on the definitions of terms used in these provisions. The Act itself defines some of these terms. Others have been defined and construed in decisions of the courts. In the following sections some of these basic definitions are set forth for ready reference in connection with the part's discussion of the various provisions in which they appear. Some of these definitions and their application are considered in detail in other interpretative bulletins. The application of the others is considered in the sections of this part where the particular provisions containing the defined terms are discussed.

§ 779.12 Commerce.

"Commerce" as used in the Act includes interstate and foreign commerce. It is defined in section 3(b) of the Act to mean "trade, commerce, transportation, transmission or communication among the several States or between any State and any place outside thereof." (For the definition of "State" see § 779.16.) The application of this definition and the kinds of activities which it includes are discussed at length in the interpretative bulletin on general coverage of the Act, Part 776 of this chapter.

§ 779.13 Production.

To understand the meaning of "production" of goods for commerce as used in the Act it is necessary to refer to the definition in section 3(j) of the term "produced." A detailed discussion of the application of the term as defined is contained in the interpretative bulletin on general coverage of the Act, Part 776 of this chapter. Section 3(j) provides that "produced" as used in the Act "means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." (For the definition of "State," see § 779.16.)

§ 779.14 Goods.

The definition in section 3(i) of the Act states that "goods," as used in the Act, means "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The interpretative bulletin on general coverage of the Act, Part 776 of this chapter, contains a detailed discussion of the application of this definition and what is included in it.

§ 779.15 Sale and resale.

(a) Section 3(k) of the Act provides that "Sale" or "sell", as used in the Act, "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Since "goods", as defined, includes any part or ingredient of goods (see § 779.14), a "resale" of goods includes their sale in a different form than when first purchased or sold, such as the sale of goods of which they have become a component part (Arnold v. Kanowsky, 361 U.S. 388). The Act, in section 3(n), provides one exception to this rule by declaring that "resale", as used in the Act, "shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry." A resale of goods is not confined to resale of the goods as such, but under section 3(k) may include an "other disposition" of the goods in which they are disposed of in a transaction of a different kind; thus the sale by a restaurant to an airline of prepared meals to be served in flight to passengers whose tickets entitle them to a "complimentary" meal is a sale of goods "for resale". (Mitchell v. Sherry Corine Corp., 264 F 2d 831 (C.A. 4), cert. denied 360 U.S. 934.)

(b) In construing section 3(s) (1) of the Act as it was prior to the 1966 amendments it should be noted that section 3(n) of the prior Act defined "resale" by declaring that this term, "except as used in subsection (s) (1), shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry." Thus, although section 3(n) of the prior Act also provided the one exception to the meaning of "resale", it made clear that the exception was inapplicable in determining under section 3(s) (1) of the prior Act, "if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total volume to $250,000 or more". The application of the inflow test under section 3(s) (1) of the prior Act is discussed fully in Subpart C of this part.

§ 779.16 State.

As used in the Act, "State" means "any State of the United States or the District of Columbia or any Territory or possession of the United States" (Act, section 3(c)). The application of this definition in determining questions of coverage under the Act's definition of "commerce" and "produced" (see §§ 779.12, 779.13) is discussed in the interpretative bulletin on general coverage, Part 776 of this chapter. This definition is also important in determining whether goods "for resale" purchased or received by an enterprise move or have moved across State lines within the meaning of former section 3 (s) (1) of the Act (prior to the 1966 amendments) and whether sales of goods or services are "made within the State" within the meaning of the retail or service establishment exemption in section 13(a) (2), as discussed in Subpart D of this part.

§ 779.17 Wage and wage payments to tipped employees.

Section 3(m) of the Act provides that as used in the Act, "wage" paid to any employee:

"includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that in the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased under this sentence, the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount."

As explained in Part 531 of this chapter, section 3(m) of the Act governs the payment of wages required by the Act, including payment in other than cash and in tips. Part 531 of this chapter contains the regulations under which the reasonable cost or fair value of such facilities furnished may be computed for inclusion as part of wages required by the Act. Section 3(m) provides a method for determining the wage of a "tipped employee" and this term as defined in section 3(t) of the Act "means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips". Regulations under which wage credits are permitted on account of tips paid to "tipped employees" are also contained in Part 531 of this chapter.

§ 779.18 Regular rate.

As explained in the interpretative bulletin on overtime compensation, Part 778 of this chapter, employees subject to the overtime pay provisions of the Act must generally receive for their overtime work in any workweek as provided in the Act not less than one and one-half times their regular rates of pay. Section 7(e) of the Act defines "regular rate" in the following language:

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include

(1) Sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses or other expenses, incurred by an

employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulation which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

(4) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) Extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) Extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding 8 hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

This definition, which is discussed at length in Part 778 of this chapter, also governs the computation of "regular rate" for purposes of the special overtime exemption of certain commission employees of retail or service establishments which is contained in section 7(i) of the Act and is discussed in Subpart E of this part.

§ 779.19 Employer, employee, and employ.

The Act's major provisions impose certain requirements and prohibitions on every "employer" subject to their terms. The employment by an "employer" of an "employee" is, to the extent specified in the Act, made subject to minimum wage and overtime pay requirements and to prohibitions against the employment of oppressive child labor. The Act provides its own definitions of "employer," "employee", and "employ", under which "economic reality" rather than "technical concepts" determines whether there is employment subject to its terms (Goldberg v. Whitaker House Cooperative, 366 U.S. 28; United States v. Silk, 331 U.S. 704; Rutherford Food Corp. v. McComb, 331 U.S. 722). An "employer", as defined in section 3(d) of the Act, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State or a political subdivision thereof, employed (a) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (b) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization". An "employee", as defined in section 3(e) of the Act, "includes any individual employed by an employer" (except that the term is further qualified for purposes of counting man-days of employment by an employer in agriculture). "Employ", as used in the Act, is defined in section 3(g) to include "to suffer or permit to work". It should be noted, as explained in the interpretative bulletin on general coverage, Part 776 of this chapter, that in appropriate circumstances two or more employers may be jointly responsible for compliance with the statutory requirements applicable to employment of a particular employee. It should also be noted that "employer", "enterprise", and "establishment" are not synonymous terms, as used in the Act. An employer may have an enterprise with more than one establishment, or he may have more than one enterprise, in which he employs employees within the meaning of the Act. Also, there may be different employers who employ employees in a particular establishment or enterprise.

§ 779.20 Person.

As used in the Act (including the definition of "enterprise" set forth in § 779.21), "person" is defined as meaning "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." (Act, section 3(a).)

§ 779.21 Enterprise.

(a) Section 3(r) of the Act provides, in pertinent part that "enterprise" as used in the Act—

> "means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (a) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (b) that it will join with other such establishments in the same industry for the purpose of the collective purchasing, or (c) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments * * *

The scope and application of this definitional language is discussed in Subpart C of this part.

(b) The 1966 amendments added two clauses to the above language of the definition to make it clear that "the activities performed by any person or persons" will be regarded as performed for a business purpose if they are performed—

> "(1) In connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or
>
> "(2) In connection with the operation of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit)."

A discussion of the scope and application of this added language is contained in Part 776 of this chapter.

§ 779.22 Enterprise engaged in commerce or in the production of goods for commerce.

The portions of the former and present definitions of "enterprise engaged in commerce or in the production of goods for commerce" (contained in section 3(s) of the Act prior to the 1966 amendments and as amended in 1966) which are important to a determination of the application of provisions of the Act to employees employed by retailers generally and by certain retail or service establishments are as follows:

Previous coverage (prior to the 1966 amendments)—

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(1) Any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1 million, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

* * * * *

(5) Any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excise taxes at the retail level which are separately stated:

Provided, That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner thereof or persons standing in the relationship of parent, spouse, or child of such owner.

New coverage (beginning with the 1966 amendments)—

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) During the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

* * * * *

(4) Is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

§ 779.23 Establishment.

As used in the Act, the term "establishment", which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (Phillips v. Walling, 324 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., 1st Sess., p. 25). As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.

§ 779.24 Retail or service establishment.

In the 1949 amendments to the Act, the term "retail or service establishment", which was not previously defined in the law, was given a special definition for purposes of the Act. The legislative history of the 1961 and the 1966 amendments to the Act, which use the same term in a number of provisions relating to coverage and exemptions, indicates that no different meaning was intended by the term "retail or service establishment" as used in the new provisions from that already established by the Act's definition. On the contrary, the existing definition was reenacted in section 13(a)(2) of the Act as amended in 1961

BEST DOCUMENT AVAILABLE

and 1966 as follows: "A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry". The application of this definition, which has had much judicial construction since its original enactment, is considered at length in Subpart D of this part. As is apparent from the quoted language, not every establishment which engages in retail selling of goods or services will constitute a "retail or service establishment" within the meaning of the Act.

Subpart B—Employment to Which the Act May Apply: Basic Principles and Individual Coverage

General Principles

§ 779.100 Basic coverage in general.

Except as otherwise provided in specific exemptions, the minimum wage, maximum hours, overtime pay, equal pay, and child labor provisions of the Act have applied and continue to apply subsequent to the 1966 amendments to employees who are individually engaged in interstate commerce or in the production of goods for such commerce as these terms are defined in the Act and to employees in certain enterprises described in the amended section 3(s) which were covered under section 3(s) of the Act prior to the amendments. Through the broadening of the definition of a covered enterprise the Act's coverage was extended to additional employees because of their employment in certain enterprises beginning February 1, 1967, and in certain other enterprises beginning February 1, 1969. Such covered enterprises are described in section 3(s) as enterprises engaged in commerce or in the production of goods for commerce and further described in sections 3(s) (1) through (4) of the amended Act. A detailed discussion of the coverage of employees in those enterprises covered under the prior and amended Act of interest to the retail industry is contained in Subpart C of this part. The employer must comply with the minimum wage and overtime requirements of the Act with respect to all employees who are covered either because they are individually engaged in interstate or foreign commerce or in the production of goods for such commerce, or because of their employment in an enterprise covered under the prior or amended enterprise definition of the Act, except those who may be denied one or both of these benefits by virtue of some specific exemption provision of the Act. Of special interest to the retailer in a covered enterprise is the exemption from the minimum wage and overtime provisions for certain small retail or service establishments of such enterprise. This exemption is applicable under the conditions and subject to exceptions stated in section 13(a) (2) of the Act to any retail or service establishment which has an annual dollar volume of sales of less than $250,000 (exclusive of certain excise taxes) even if the establishment is a part of an enterprise that is covered by the Act. This exemption and other exemptions of particular interest to retailers and their employees are discussed in Subparts D and E of this part. The child labor provisions as they apply to retail or service businesses are discussed in Subpart F of this part.

§ 779.101 Guiding principles for applying coverage and exemption provisions.

It is clear that Congress intended the Fair Labor Standards Act to be broad in its scope. "Breadth of coverage is vital to its mission." (Powell v. U.S. Cartridge Co., 339 U.S. 497.) An employer who claims an exemption under the Act has the burden of showing that it applies. (Walling v. General Industries Co., 330 U.S. 545; Mitchell v. Kentucky Finance Co., 359 U.S. 290; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52.) Conditions specified in the language of the Act are "explicit prerequisites to exemption." (Arnold v. Kanowsky, 361 U.S. 388.) "The details with which the exemptions in this Act have been made preclude their enlargement by implication." (Addison v. Holly Hill, 322 U.S. 60; Maneja v. Waialua, 349 U.S. 254.) Exemptions provided in the Act "are to be narrowly construed against the employer seeking to assert them" and their application limited to those who come plainly and unmistakably within their terms and spirit; this restricted or narrow construction of the exemptions is necessary to carry out the broad objectives for which the Act was passed. (Phillips v. Walling, 324 U.S. 490; Mitchell v. Kentucky Finance Co., supra; Arnold v. Kanowsky, supra; Calaf v. Gonzalez, 127 F. 2d 934; Bowie v. Gonzalez, 117 F. 2d 11; Mitchell v. Stinson, 217 F. 2d 210; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52.)

§ 779.102 Scope of this subpart.

The Act has applied since 1938 and continues to apply to all employees, not specifically exempted, who are engaged (a) in interstate or foreign commerce or (b) in the production of goods for such commerce, which is defined to include any closely related process or occupation directly essential to such production. (See §§ 779.12-779.16 for definitions governing the scope of this coverage.) Prior to the 1961 amendments a retailer was not generally concerned with the coverage provisions as they applied to his individual employees because retail or service establishments ordinarily were exempt. However, in some cases such coverage was applicable as where employees were employed in central offices of warehouses of retail chain store systems and, therefore, were not exempt. (See § 779.118.) Some exemptions for retail or service establishments were narrowed as a result of the 1961 amendments and further revised or eliminated by the 1966 amendments effective February 1, 1967. Therefore, discussion of the individual coverage provisions of the Act is pertinent and this subpart will discuss briefly the principles of such coverage with particular reference to employment in the retail or service trades. A more comprehensive discussion with respect to employees engaged in commerce or in the production of goods for commerce may be found in Part 776 of this chapter, the general coverage bulletin.

EMPLOYEES ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE

§ 779.103 Employees "engaged in commerce."

Employees are "engaged in commerce" within the meaning of the Act when they are performing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) among the several States or between any State and any place outside thereof. (The statutory definition of commerce is contained in section 3(b) of the Act and is set forth in § 779.12.) The courts have made it clear that this includes every employee employed in the channels of such commerce or in activities so closely related to this commerce, as to be considered a part of it as a practical matter. (Court cases are cited in the discussion of this term in §§ 776.9-776.13 of this chapter). Typically, but not exclusively, employees engaged in interstate or foreign commerce include employees in distributing industries, such as wholesaling or retailing, who sell, handle or otherwise work on goods moving in interstate commerce as well as workers who order, receive, pack, ship, or keep records of such goods; clerical and other workers who regularly use the mails, telephone or telegraph for interstate communication; and employees who regularly travel across State lines while working.

§ 779.104 Employees "engaged in the production of goods for commerce."

The activities constituting "production" within the meaning of the phrase "engaged in * * * the production of goods for commerce" are defined in section 3(j) of the Act. (The statutory definition is set forth in § 779.13.) The handling or otherwise working on goods intended for shipment out of the State, directly or indirectly, in engagement in the "production" of goods for commerce. Thus, employees in retail stores who sell, pack, or otherwise work on goods which are to be shipped or delivered outside of the State are engaged in the production of goods for commerce.

Typically, but not exclusively, employees engaged in the production of goods for interstate or foreign commerce, include those who work in manufacturing, processing and distributing establishments, including wholesale or retail establishments, that produce goods for interstate or foreign commerce. This includes everyone, including office, management, sales and shipping personnel, and maintenance, custodial and protective employees, whether they are employed by the producer or an intermediary. Employees may be covered even if their employer does not ship his goods directly in such commerce. The goods may leave the State through another firm. The workers may produce goods which become a part or ingredient of goods shipped in interstate or foreign commerce by another firm. Also covered are workers who are engaged in a closely related process or occupation directly essential to such production. (See § 779.105.)

§ 779.105 Employees engaged in activities "closely related" and "directly essential" to the production of goods for commerce.

Some employees are covered because their work, although not actually a part of such production, is "closely related" and "directly essential" to it. This group of employees includes bookkeepers, stenographers, clerks, accountants and auditors and other office and white collar workers, and employees doing payroll, timekeeping and time study work for the producer of goods; employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise; work instructors for the producer; employees maintaining, servicing, repairing or improving the buildings, machinery, equipment, vehicles or other facilities used in the production of goods for commerce, and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are illustrative, rather than exhaustive, of the group of employees of a producer who are "engaged in the production of goods for commerce" by reason of performing activities closely related and directly essential to such production.

§ 779.106 Employees employed by an independent employer.

Where the work of an employee would be closely related and directly essential to the production of goods for commerce if he were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer. (See §§ 776.17(c) and 776.19 of this chapter.)

§ 779.107 Goods defined.

The term "goods" is defined in section 3(i) of the Act and has a well established meaning under the Act since it has been contained in the statute from the date of its enactment in 1938. A comprehensive statement of the meaning of the term "goods" is contained in Part 776 of this chapter, which also cites the court cases in which the term was construed. The statutory definition of "goods" is set forth in § 779.14. It will be observed that the term "goods" includes any part or ingredient of the goods. Also that "goods" as defined in the Act are not limited to commercial goods, or articles of trade, or, indeed, to tangible property, but include "articles or subjects of commerce of any character." Thus telegraphic messages have been held to be "goods" within the meaning of the Act (Western Union Tel. Co. v. Lenroot, 323 U.S. 490). Some of the "articles or subjects of commerce" which fall within the definition of "goods" include written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements; written reports, fiscal and other statements and accounts, correspondence, and other documents; advertising, motion pictures, newspaper and radio copy; art work and manuscripts for publication; sample books, letterheads, envelopes, shipping tags, labels, checkbooks, blankbooks, book covers, advertising circulars, and wrappers and other packaging materials.

§ 779.108 Goods produced for commerce.

Goods are "produced for commerce" if they are "produced, manufactured, mined, handled or in any other manner worked on" in any State for sale, trade, transportation, transmission, shipment or delivery, to any place outside thereof. Goods are produced for commerce where the producer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in interstate or foreign commerce. If such movement of the goods in commerce can reasonably be anticipated by the producer when the goods are produced, it makes no difference whether he himself or the person to whom the goods are transferred puts the goods in interstate or foreign commerce. The fact that goods do move in interstate or foreign commerce is strong evidence that the producer intended, hoped, expected, or had reason to believe that they would so move. Goods produced to serve the movement of interstate commerce within the same State are also produced for commerce within the meaning of the Act, as explained in Part 776 of this chapter.

§ 779.109 Amount of activities which constitute engaging in commerce or in the production of goods for commerce.

The Act makes no distinction as to the percentage, volume, or amount of activities of either the employee or the employer which constitute engaging in commerce or in the production of goods for commerce. However, an employee whose in-commerce or production activities are isolated, sporadic, or occasional and involve only insubstantial amounts of goods will not be considered "engaged in commerce or in the production of goods for commerce" by virtue of that fact alone. The law is settled that every employee whose activities in commerce or in the production of goods for commerce, even though small in amount are regular and recurring, is considered "engaged in commerce or in the production of goods for commerce".

§ 779.110 Employees in retailing whose activities may bring them under the Act.

The discussion in §§ 779.103 to 779.109 included general reference to types of employees in the retail or service field whose individual activities constitute engagement in interstate or foreign commerce or in the production of goods for such commerce within the meaning of the Act. There are many classes of employees customarily employed by retail or service establishments or enterprises whose individual activities ordinarily constitute engagement in commerce or in the production of goods for commerce within the meaning of the Act. The groups of employees discussed in the following §§ 779.111 to 779.118, are illustrative only. There are other employees whose activities may be covered; also there are other activities performed by the groups discussed which would result in individual coverage under the Act.

§ 779.111 Buyers and their assistants.

Buyers and their assistants, employed by retail businesses, as a regular part of their duties, generally travel across State lines, or use the mails, telegraph, or telephone for interstate communication to order goods; or they regularly send or receive, across State lines, written reports, messages or other documents. These activities of such employees constitute engagement "in commerce" within the meaning of the Act.

§ 779.112 Office employees.

Similarly office employees of retail businesses who regularly and recurrently check records of and make payments for goods shipped to their employer from outside of the State, or regularly and recurrently keep records of or otherwise work on the accounts of their employer's out-of-State customers, or who regularly and recurrently prepare or mail letters, checks, reports or other documents to out-of-State points, are engaged both in commerce and in the production of goods for commerce within the meaning of the Act. Likewise, timekeepers who regularly and recurrently prepare and maintain payrolls for and pay employees who are engaged in commerce or in the production of goods for commerce are themselves engaged in covered activities.

§ 779.113 Warehouse and stock room employees.

Warehouse and stock room employees of retail businesses who regularly and recurrently engage in the loading or unloading of goods moving in commerce, or who regularly and recurrently handle, pack or otherwise work on goods that are destined to out-of-State points are engaged in covered activities.

§ 779.114 Transportation employees.

Transportation employees of retail businesses, such as truck drivers or truck drivers' helpers, who regularly and recurrently cross State lines to make deliveries or to pick up goods for their employer; or who regularly and recurrently pick up at rail heads, air, bus or other such terminals goods originating out of State, or deliver to such terminals goods destined to points out of State; and dispatchers who route, plan or otherwise control such out-of-State deliveries and pick ups, are engaged in interstate commerce within the meaning of the Act.

§ 779.115 Watchmen and guards.

Watchmen or guards employed by retail businesses who protect the warehouses, workshops, or store premises where goods moving in interstate or foreign commerce are kept or where goods are produced for such commerce, are covered under the Act.

§ 779.116 Custodial and maintenance employees.

Custodial and maintenance employees who perform maintenance and custodial work on the machinery, equipment, or premises where goods regularly are produced for commerce or from which goods are regularly shipped in interstate commerce are engaged in covered activities.

§ 779.117 Salesmen and sales clerks.

A salesman or a sales clerk who regularly and recurrently takes orders for, or sells, or selects merchandise for delivery to points outside the State or which are to be shipped or delivered to a customer from a point outside the State, i.e. drop shipments; or who wraps, packs, addresses or otherwise prepares goods for out-of-State shipments is performing covered activities.

§ 779.118 Employees providing central services for multi-unit organizations.

Employees providing central services for a multiunit organization may be engaged both "in commerce" and "in the production of goods for commerce" within the meaning of the Act. For example, employees engaged in work relating to the coordinated purchasing, warehousing and distribution (and in the administrative and clerical work relating to such activities) for various retail units of a chain are covered under the Act. (See Phillips Co. v. Walling, 324 U.S. 490; Walling v. Jacksonville Paper Co., 317 U.S. 564, affirming, 128 F. 2d 935 (CA-5); Mitchell v. C. & P. Stores, 286 F. 2d 109 (CA-5); Mitchell v. E. G. Shinner & Co., Inc., 221 F. 2d 260 (CA-7); Donovan v. Shell Oil Co., 168 F. 2d 776 (CA-8).) In addition, employees who regularly and recurrently correspond and maintain records of activities of out-of-State stores and such employees as traveling auditors, inventory men, window display men, etc., who regularly travel from State to State in the performance of their duties are covered under the Act. (See Mitchell v. Kroger Co., 248 F. 2d 935 (CA-8).)

§ 779.119 Exempt occupations.

Of course, it should be noted that although employees may be engaged in commerce or in the production of goods for commerce within the meaning of the Act, they may be exempt from the Act's minimum wage or overtime provisions (or both). For a complete list of such exemptions the Act should be consulted. Those exemptions, however, which are of particular interest to employers and employees in the retail field are discussed in Subparts D, E, and F of this part.

Subpart C—Employment to Which the Act May Apply; Enterprise Coverage

ENTERPRISE; THE BUSINESS UNIT

§ 779.200 Coverage expanded by 1961 and 1966 amendments.

The 1961 amendments for the first time since the enactment of the Fair Labor Standards Act of 1938 provided that all employees in a particular business unit are covered by the Act. Prior to the 1961 amendments each employee's coverage depended on whether that employee's activities were in commerce or constituted the production of goods for commerce. All employees employed in an "enterprise" described in section 3(s) (1) through (5) of the Act as it was amended in 1961 and section 3(s) (1) through (4) of the Act as amended in 1966 are also covered. Thus, it is necessary to consider the meaning of the term "enterprise" as used in the Act.

§ 779.201 The place of the term "enterprise" in the Act.

The term "enterprise" is defined in section 3(r) of the Act and, wherever used in the Act, is governed by this definition. (§ 779.21(a) provides that portion of the definition of "enterprise" which is pertinent with respect to retail and service enterprises.) The term is a key in determining the applicability of the Act to these businesses. The "enterprise" is the unit for determining whether the conditions of section 3(s) (1) through (5) of the prior Act and section 3(s) (1) through (4) of the amended Act, including, where applicable, the requisite dollar volume are met. The "enterprise" is also the unit for determining which employees not individually covered by the Act are entitled to the minimum wage, overtime, and equal pay benefits, and to the child labor protection, under sections 6, 7, and 12 of the Act. In general, if the "enterprise" comes within any of the categories described in section 3(s) (1) through (5) of the prior Act or section 3(s) (1) through (4) of the amended Act, all employees employed in the "enterprise" are covered by the Act and, regardless of their duties, are entitled to the Act's benefits unless a specific exemption applies.

§ 779.202 Basic concepts of definition.

Under the definition, the "enterprise" consists of "the related activities performed * * * for a common business purpose." All of the activities comprising the enterprise must be "related." Activities serving a single business purpose may be related, although different, but other activities which are not related are not included in the enterprise. The definition makes clear that the enterprise includes all such related activities which are performed through "unified operation" or "common control." This is true even if they are performed by more than one person, or in more than one establishment, or by more than one corporate or other organizational unit. Specifically included, as a part of the enterprise, are departments of an establishment operated through leasing arrangements. On the other hand, the definition excludes from the "enterprise" activities only performed "for" the enterprise rather than as a part of it by an independent contractor even if they are related to the activities of the enterprise. Also, it makes clear that a truly independent retail or service establishment does not become a part of a larger enterprise merely because it enters into certain types of franchise or collective purchasing arrangements or because it has a common landlord with other such retail establishments.

§ 779.203 Distinction between "enterprise," "establishment," and "employer."

The coverage, exemption and other provisions of the Act depend, in part, on the scope of the terms "employer," "establishment," or "enterprise." As explained more fully in Part 776 of this chapter, these terms are not synonymous. The term "employer" has been defined in the Act since its inception and has a well established meaning. As defined in section 3(d), it includes, with certain stated exceptions, any person acting directly or indirectly in the interest of an employer in relation to an employee. (See § 779.19.)

The term "establishment" means a "distinct physical place of business" rather than "an entire business or enterprise." (See § 779.23.) The term "enterprise" was not used in the Act prior to the 1961 amendments, but the careful definition and the legislative history of the 1961 and 1966 amendments provide guidance as to its meaning and application. As defined in the Act, the term "enterprise" is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide. The enterprise may consist of a single establishment (see § 779.204(a)) which may be operated by one or more employers; or it may be composed of a number of establishments which may be operated by one or more employers (see § 779.204(b)). The enterprise is not necessarily coextensive with the entire business activities of an employer; a single employer may operate more than one enterprise (see § 779.204(c)). The Act treats as separate enterprises different businesses which are unrelated to each other even if they are operated by the same employer.

§ 779.204 Common types of "enterprise."

(a) *The single establishment business.* In the simplest type of organization—the entire business ordinarily is one enterprise. The entire business activity of the single owner-employer may be performed in one establishment, as in the typical independently owned and controlled retail store. In that case the establishment and the enterprise are one and the same. All of the activities of the store are "related" and are performed for a single business purpose and there is both unified operation and common control. The entire business is the unit for applying the statutory tests. If the coverage tests are met, all of the employees employed by the establishment are employed in the enterprise and will be entitled to the benefits of the Act unless otherwise exempt.

(b) *The multiunit business.* In many cases, as in the typical chain of retail stores, one company conducts its single business in a number of establishments. All of the activities ordinarily are related and performed for one business purpose, the single company which owns the chain also controls the entire business, and the entire business is a single enterprise. The dollar volume of the entire business from all of its establishments is added together to determine whether the requisite dollar volume tests are met. If the coverage tests are met, all of the employees employed in the business will be entitled to the benefits of the Act unless otherwise exempt.

(c) *Complex business organizations.* In complex retail and service organizations, questions may arise as to whether certain activities are a part of a particular enterprise. In some cases one employer may operate several separate enterprises; in others, several employers may conduct their business activities in such a manner that they are part of a single enterprise. The answer, in each case, as to whether or not the "enterprise" includes certain activities will depend upon whether the particular activities are "related" to the business purpose of such enterprise and whether they are performed with its other activities through "unified operation" or "common control," or whether, on the other hand, they are performed for a separate and distinct business purpose. As the Senate Report states,

> "related activities conducted by separate business entities will be considered a part of the same enterprise where they are joined either through unified operation or common control into a unified business system or economic unit to serve a common business purpose."

(S. Rept. 145, 87th Cong., 1st Sess., p. 41; see also H. Rept. 1366, 89th Cong., 2d Sess., p. 9.) §§ 779.205 through 779.211 discuss the terms of the definition and may aid in making these determinations.

RELATED ACTIVITIES

§ 779.205 Enterprise must consist of "related activities."

The enterprise must consist of certain "related activities" performed for a common business purpose; activities which are not "related" are not a part of the enterprise even if performed by the same employer. Moreover, even if activities are "related" they may be excluded from the enterprise if they are performed only "for" the enterprise and not as a part of it by an independent contractor. This is discussed separately in § 779.206.

§ 779.206 What are "related activities."

(a) The Senate Report on the 1961 amendments states as follows, with respect to the meaning of related activities:

> Within the meaning of this term, activities are "related" when they are the same or similar, such as those of the individual retail or service stores in a chain, or departments of an establishment operated through leasing arrangements. They are also "related" when they are auxiliary and service activities such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising and other services. Likewise, activities are "related" when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose. (Senate Report No. 145, 87th Cong., 1st Sess., Page 41.)

Thus, activities will be regarded as "related" when they are the same or similar or when they are auxiliary or service activities such as warehousing, bookkeeping, purchasing, advertising, including, generally, all activities which are necessary to the operation and maintenance of the particular business. So also, all activities which are performed as a part of the unified business operation will be "related," including, in appropriate cases, the manufacturing, warehousing, and distribution of its goods, the repair and maintenance of its equipment, machinery and its premises, and all other activities which are performed for the common business purpose of the enterprise. The Senate Report on the 1966 amendments makes it plain that related, even if somewhat different, business activities can frequently be part of the same enterprise, and that activities having a reasonable connection with the major purpose of an enterprise would be considered related. (Senate Report No. 1487, 89th Cong., 2d Sess., Page 7.) A more comprehensive discussion of "related activities" will be found in Part 776 of this chapter.

(b) Generally, the answer to the question whether particular activities are "related" or not, will depend in each case upon whether the activities serve a business purpose common to all the activities of the enterprise, or whether they serve a separate and unrelated business purpose. For example, where a company operates retail or service establishments, and also engages in a separate and unrelated construction business, the construction activities will not be "related" and will constitute a separate enterprise if they are conducted independently and apart from the retail operations. Where, however, the retail and construction activities are conducted for a common business purpose, they may be "related," and if they are performed through unified operation or common control, they will be a part of a single enterprise. Thus, a retail store enterprise may engage in construction activities as an additional outlet for building materials which it sells, or otherwise to serve its retail operations. It may act as its own contractor in constructing or reconstructing its own stores and related facilities. In such a case, the construction activities will be "related" activities. Other examples may also be cited. The answer in each case will necessarily depend upon all the facts.

§ 779.207 Related activities in retail operations.

In the case of an enterprise which has one or more retail or service establishments, all of the activities which are performed for the furtherance of the common business purpose of operating the retail or service establishments are "related activities." It is not material that the enterprise sells different goods or provides different services, or that it operates separate retail or service establishments. As stated in the definition, the enterprise includes all related activities whether performed "in one or more establishments." Since the activities performed by one retail or service establishment are the "same or similar" to the activities performed by another, they are, as such, "related activities." (See Senate Report No. 145, 87th Cong. 1st Sess. p.

41.) For example, in operations of a single retailing business a drug store may sell a large variety of different products, and a grocery store may sell clothing and furniture and other goods. Clearly all of these activities are "related." Similarly it is clear that all activities of a department store are "related activities," even if the store sells a great variety of different types of goods and services and even if, as in some cases, the departmentalized business is conducted in more than one location, as where the department selling garden supplies or electrical appliances is located on separate premises. Whether on the same premises or at separate locations, the activities involved in retail selling of goods or services, of any type, are related activities and they will be considered one enterprise where they are performed, through unified operation or common control, for a common business purpose.

§ 779.208 Auxiliary activities which are "related activities."

As stated in Senate Report No. 145, 87th Congress, 1st Session, cited in § 779.206, auxiliary and service activities, such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising and other similar services, also are "related activities." When such activities are performed through unified operation or common control, for a common business purpose, they will be included in the enterprise. The following are some additional examples of auxiliary activities which are "related activities" and which may be included in the enterprise: (a) Credit rating and collection services; (b) promotional activities including advertising, sign painting, display services, stamp redemptions, and prize contests; (c) maintenance and repair services of plant machinery and equipment including painting, decorating, and similar services; (d) store or plant engineering, site location and related survey activities; (e) detective, guard, watchmen, and other protective services; (f) delivery services; (g) the operation of employee or customer parking lots; (h) the recruitment, hiring and training activities, and other managerial services; (i) recreational and health facilities for customers or employees including eating and drinking facilities (note that employees primarily engaged in certain food service activities in retail establishments may be exempt from the overtime provisions under section 13(b)(18) of the Act if the specific conditions are met; see § 779.388); (j) the operation of employee benefit and insurance plans; and (k) repair and alteration services on goods for sale or sold to customers.

§ 779.209 Vertical activities which are "related activities."

(a) The Senate Report also states (see § 779.206 that activities are "related" when they are "part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products." Where such activities are performed through unified operation or common control for a common business purpose they will be regarded as a part of the enterprise.

(b) Whether activities are vertically "related" activities and part of a single enterprise, or whether they constitute separate businesses are separate enterprises, depends upon the facts in each case. In all of these cases of so-called "vertical operations," the determination whether the activities are "related," depends upon the extent to which the various business activities, such as a wholesaling and retailing or manufacturing and retailing, are interrelated and interdependent and are performed to serve a business objective common to all. The mere fact that they are under common ownership is not, by itself, sufficient to bring them within the same enterprise. Thus, where a manufacturing business is carried on separately from and wholly independently of a retail business, with neither serving the business purpose of the other, they are separate businesses even if they are under common ownership. However, where the manufacturing operations are performed in substantial part for the purpose of distributing the goods through the retail stores, or the retail outlet serves to carry out a business purpose of the manufacturing plant, retailing and manufacturing will be "related" activities and performed for a "common business purpose," and they will be a single enterprise if they are performed through unified operations or common control.

(c) In these cases of "vertical operations" a practical judgment will be required to determine whether the activities are maintained and operated as separate and distinct businesses with different objectives or whether they, in fact, constitute a single integrated business enterprise. The answer necessarily will depend upon all the facts in each case.

§ 779.210 Other activities which may be part of the enterprise.

(a) An enterprise may perform certain activities that appear entirely foreign to its principal business but which may be a part of the enterprise because of the manner in which they are performed. In some cases these activities may be a very minor and incidental part of its business operations. For example a retail store may accept payments of utility bills, provide a notarial service, sell stamps, bus and theater tickets, or travellers' checks, etc. These and other activities may be entirely different from the enterprise's principal business but they may be performed on the same premises and by the same employees or otherwise under such circumstances as to be a part of the enterprise.

(b) Sometimes such activities are performed as an adjunct to the principal business to create good will or to attract customers. In other cases, the businessman may engage in them primarily for the additional revenue. Some such foreign activities may be conducted in a more elaborate manner, as where the enterprise operates a bus stop or a post office substation as an adjunct to a principal business such as a hotel or a retail store. Where in such a case the activities are performed in a physically separate "establishment" (see §§ 779.303-779.308) from the other business activities of the enterprise and are functionally operated as a separate business, separately controlled, with separate employees, separate records, and a distinct business objective of its own, they may constitute a separate enterprise. Where, however, such activities are intermingled with the other activities of the enterprise and have a reasonable connection to the same business purpose they will be a part of the enterprise.

§ 779.211 Status of activities which are not "related."

Activities which are not related even if performed by the same employer are not included as a part of the enterprise. The receipts from the unrelated activities will not be counted toward the annual dollar volume of sales or business under section 3(s) and the employees performing such unrelated activities will not be covered merely because they work for the same employer. Common ownership standing alone does not bring unrelated activities within the scope of the same enterprise. If, for example, one individual owns or controls a bank, a filing station, and a factory, the mere fact of common ownership will not make them one enterprise. However, if it appears that there is a reasonable relationship of all the activities to a single business purpose a different conclusion might be warranted. Activities which are not "related" will be treated separately for purposes of the tests contained in section 3(s) (1) through (5) of the prior Act and section 3(s) (1) through (4) of the amended Act. For example, in the case where a single company operates retail grocery stores and also engages in an unrelated business of constructing homes, one "enterprise" for purposes of section 3(s)(1) of both the prior and the amended Act will consist of the retail grocery stores and any activities related to them, and home construction activities will constitute a separate enterprise. The latter will not be included in determining whether the retail business enterprise meets the conditions of section 3(s)(1), and the construction employees will not be covered merely because the retail business is covered. The construction business will be considered separately under section 3(s)(4) of the poor Act and section 3(s)(3) of the amended Act.

COMMON BUSINESS PURPOSE

§ 779.212 Enterprise must consist of related activities performed for a "common business purpose."

The related activities described in section 3(r) as included in the statutory enterprise are those performed for a "common business purpose." (See the comprehensive discussion in 29 CFR Part 776.) The term "common business purpose" as used in the definition does not have a narrow concept and is not intended to be limited to a single business establishment or a single type of business. As pointed out above, retailing, wholesaling and manufacturing may, under certain circumstances be engaged in for a "common business purpose." (See § 779.209.) An example was also cited where retailing and construction were performed for a common business purpose. (See § 779.206.) On the other hand, it is clear that even a single individual or corporation may perform activities for different business purposes. (See § 779.211.) Thus the reports of the House of Representatives cite, as an example of this, the case of a single company which owns several retail apparel stores and is also engaged in the lumbering business. It concludes that these activities are not part of a single enterprise. (H. Rept. 75, 87th Cong.,1st Sess., p. 7 and H. Rept. 1366, 89th Cong. 2d Sess., p. 9.)

§ 779.213 What is a common business purpose.

Generally, the term "common business purpose" will encompass activities whether performed by one person or by more than one person, or corporation, or other business organization, which are directed to the same business objective or to similar objectives in which the group has an interest. The scope of the term "enterprise" encompasses a single business entity as well as a unified business system which performs related activities for a common business purpose. What is a "common business purpose" in any particular case involves a practical judgment based on the facts in the light of the statutory provisions and the legislative intent. The answer ordinarily will be readily apparent from the facts. The facts may show that the activities are related to a single business objective or that they are so operated or controlled as to form a part of a unified business system which is directed to a single business objective. In such cases, it will follow that they are performed for a common business purpose. Where, however, the facts show that the activities are not performed as a part of such enterprise but for an entirely separate and unrelated business, they will be considered performed for a different business purpose and will not be a part of that enterprise. The application of these principles is considered in more detail in Part 776 of this chapter.

§ 779.214 "Business" purpose.

The activities described in section 3(r) are included in an enterprise only when they are performed for a "business" purpose. Activities of eleemosynary, religious, or educational organization may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise. (See Mitchell v. Pilgrims Holiness Church Corp., 210 F. 2d 879 (CA-7); cert. den. 347 U.S. 1013.) However, the nonprofit educational, religious, and eleemosynary activities will not be included in the enterprise unless they are of the types which the last sentence of section 3(r), as amended in 1966, declares shall be deemed to be performed for a business purpose. Such activities were not regarded as performed for a business purpose under the prior Act and are not so considered under the Act as it was amended in 1966 except for those activities listed in the last sentence of amended section 3(r). (See § 779.21.)

UNIFIED OPERATION OR COMMON CONTROL

§ 779.215 General scope of terms.

(a) Under the definition related activities performed for a common business purpose will be a part of the enterprise when they are performed either through "unified operation" or "common control." It should be noted that these conditions are stated in the alternative. Thus if it is established that the described activities are performed through "common control," it is unnecessary to show that they are also performed through "unified operation," although frequently both conditions may exist.

(b) Under the definition the terms "unified operation" and "common control" refer to the performance of the "related activities." They do not refer to the ownership of the activities. Although ownership may be a significant factor in determining control (see § 779.222), the related activities will be a part of the enterprise even if they are not under common ownership, so long as they are performed for a common business purpose through unified operation or common control. Further, under the definition the terms "unified operation" and "common control" refer to the performance only of the particular related activities and not to other activities which may be performed by the various persons, corporations, or other business organizations, comprising the enterprise. Thus where two or more individual or business organizations perform certain of their activities through unified operation or common control, these activities will be part of a single enterprise, assuming of course they are related activities performed for a common business purpose. Finally, the definition in section 3(r) makes clear that the described activities may be performed through unified operation or common control "in one or more establishments or by one or more corporate or other organizational units." The Senate Report on the 1966 amendments makes the following comment with respect to this:

> Also, the operations through substantial ownership or control of a number of firms engaged in similar types of business activities constitute, in the committee's view, related activities performed through unified operation or common control within the meaning of the definition of enterprise. The fact the firms are independently incorporated or physically separate or under the immediate direction of local management, as in Wirtz v. Hardin, 16 Wage Hour Cases 722 (N.D. Ala.), is not determinative of this question. (Sen. Rept. No. 1487, 89th Congress, 2nd session, page 7.)

But where, as in the case of a retail store owned by a partnership and another store owned by one of the partners providing similar goods or services, it appears that the activities of the separate stores have no functional interdependence and that they are separately conducted to serve the business purpose of the partnership on the one hand and the business purpose of the individual on the other hand, the requirement of performance "through common control" of "related activities" for a "common business purpose" may not be sufficiently met.

§ 779.216 Statutory construction of the terms.

The terms "unified operation" and "common control" do not have a fixed legal or technical meaning. As used in the definition, these and other terms must be given an interpretation consistent with the Congressional intention to be ascertained from the context in which they are used, the legislation of which they form a part, and the legislative history. In extending coverage of the Act on an "enterprise" basis, the Congress intended, by the 1961 and 1966 amendments to cover, among others, business organizations and chain store systems which may perform their related activities through complex business arrangements or business structures, whether they perform their activities for a common business purpose through unified operation or through the retention or exercise of control. For these reasons, the definition of the term "enterprise" is stated in broad general terms. This legislative intent is evidenced both by the statements in the Committee Reports and by the definition itself, particularly the broad references to the inclusion in the "enterprise" of "all such activities" whether performed "in one or more establishments" or "by one or more corporate or other organizational units." When the Act was amended in 1966 the Congress further broadened coverage by redefining an enterprise engaged in commerce or in the production of goods for commerce in section

3(s). (See § 779.22.) Where the Congress intended to exclude certain arrangements or activities from the "enterprise" it did so by specific provision under the prior and amended Act.

§ 779.217 "Unified operation" defined.

Webster defines the word "unify" to mean "to cause to be one; to make into a unit; to unite." The pertinent definition of "operation" is a method or way of operating, working or functioning. Since the term "unified operation" has reference to the method of performing the related activities, it means combining, uniting, or organizing their performance so that they are in effect a single business unit or an organized business system which is an economic unit directed to the accomplishment of a common business purpose. The term "unified operation" thus includes a business which may consist of separate segments but which is conducted or operated as a unit or as a single business for a common business purpose.

§ 779.218 Methods to accomplish "unified operation."

There are many instances where several establishments, persons, corporations, or other business organizations, join together to perform some or all of their activities as a unified business or business system. They may accomplish such unification through agreements, franchises, grants, leases, or other arrangements which have the effect of aligning or integrating the activities of one company with the activities of others so that they constitute a single business or unified business system. Whether in any particular case the activities are performed through "unified operation" and have the effect of creating a single enterprise, will depend upon all the facts, including the manner in which the activities are performed, the agreements and arrangements which govern their performance, and the other relationships between the parties, considered in the light of the statutory provision and the legislative intent. (cf Wirtz v. Wornom's Pharmacy (E.D. Va.), 18 WH Cases 289, 365; 57 Labor Cases 32,006, 32,030.)

§ 779.219 Unified operation may be achieved without common control or common ownership.

The performance of related activities through "unified operation" to serve a common business purpose may be achieved without common control and without common ownership. In particular cases ownership or control of the related activities may be factors to be considered, along with all facts and circumstances, in determining whether the activities are performed through "unified operation." It is clear from the definition that if the described activities are performed through unified operation they will be part of the enterprise whether they are performed by one company or by more than one corporate or other organizational unit. The term "unified operation" has reference particularly to enterprises composed of a number of separate companies as is clear in the quotation from the Senate Report in § 779.215. Where the related activities are performed by a single company, or under other single ownership, they will ordinarily be performed through "common control," and the question of whether they are also performed through unified operation will not need to be decided. (Wirtz v. Barnes Grocer Co., 398 F. 2d 718 (C.A. 8).)

§ 779.220 Unified operation may exist as to separately owned or controlled activities which are related.

Whether there is unified operation of related activities will thus be of concern primarily in those cases where the related activities are separately owned or controlled but where, through arrangement, agreement or otherwise, they are so performed as to constitute a unified business system organized for a common business purpose. For example, a group of separately incorporated, separately owned companies, may agree to conduct their activities in such manner as to be for all intents and purposes a single business system except for the fact that the ownership and control of the individual segments of the business are retained, in part or in whole, by the individual companies comprising the unified business system. The various units may operate under a single trade name; construct their establishment to appear identical; use identical equipment; sell generally the same goods or provide the same type of services, and, in some cases, at uniform standardized prices; and in other respects appear to the persons utilizing their services or purchasing their goods as being the same business. They also may arrange for group purchasing and warehousing; for advertising as a single business; and for standardization of their records, as well as their credit, employment, and other business policies and practices. In such circumstances the activities may well be performed through "unified operation" sufficient to consider all of the related activities performed by the group of units as constituting one enterprise, despite the separate ownership of the various segments and despite the fact that the individual units or segments may retain control as to some or all of their own activities. That this is in accord with the congressional intent is plain, since where the Congress intended that such arrangements shall not bring a group of certain individual retail or service establishments into a single enterprise, provision to accomplish such exception was specifically included. (See § 779.226, discussing the proviso in section 3(r) with respect to certain franchise and other specified arrangements entered into between independently owned retail or service establishments and other businesses.)

§ 779.221 "Common control" defined.

Under the definition the "enterprise" includes all related activities performed through "common control" for a common business purpose. The word "control" may be defined as the act of fact of controlling; power or authority to control; directing or restraining domination. "Control" thus includes the power or authority to control. In relation to the performance of the described activities, the "control," referred to in the definition in section 3(r) includes the power to direct, restrict, regulate, govern, or administer the performance of the activities. "Common" control includes the sharing of control and it is not limited to sole control or complete control by one person or corporation. "Common" control therefore exists where the performance of the described activities are controlled by one person or by a number of persons, corporations, or other organizational units acting together. This is clearly supported by the definition which specifically includes in the "enterprise" all such activities whether performed by "one or more corporate or other organizational units." The meaning of "common control" is discussed comprehensively in Part 776 of this chapter.

§ 779.222 Ownersnip as factor.

As pointed out in § 779.215 "unified operation and "common control" do not refer to the ownership of the described activities but only to their performance. It is clear, however, that ownership may be an important factor in determining whether the activities are performed through "unified operation or common control." Thus common control may exist where there is common ownership. Where the right to control, one of the prerogatives of ownership, exists, there may be sufficient "control" to meet the requirements of the statute. Ownership, or sufficient ownership to exercise control, will be regarded as sufficient to meet the requirement of "common control." Where there is such ownership, it is immaterial that some segments of the related activities may operate on a semiautonomous basis, superficially free of actual control, so long as the power to exercise control exists through such ownership. (See Wirtz v. Barnes Grocer Co., 398 F. 2d 718 (C.A. 8).) For example, a parent corporation may operate a chain of retail or service establishments which, for business reasons, may be divided into several geographic units. These units may have certain autonomy as to purchasing, marketing, labor relations, and other matters. They may be separately incorporated, and each unit may maintain its own records, including records of its profits or losses. All the units together, in such a case, will constitute a single enterprise with the parent corporation. They would constitute a single business organization under the "common control" of the parent corporation so long as they are related activities performed for a common business purpose. The common ownership in such cases provides the power to exercise the "control" referred to in the definition. It is clear from the Act and the legislative history that the Congress did not intend that such a chain organization should escape the effects of the law with respect to any segment of its business merely by separately incorporating or otherwise dividing the related activities performed for a common business purpose.

§ 779.223 Control where ownership vested in individual or single organization.

Ownership, sufficient to exercise "control," of course, exists where total ownership is vested in a single person, family unit, partnership, corporation, or other single business organization. Ownership sufficient to exercise "control" exist also where there is more than 50 percent ownership of voting stock. (See West v. Wal-Mart, 264 F. Supp. 168 (W.D. Ark.).) But "control" may exist with much more limited ownership, and, in certain cases exists in the absence of any ownership. The mere ownership of stock in a corporation does not by itself establish the existence of the "control" referred to in the definition. The question whether the ownership in a particular case includes the right to exercise the requisite "control" will necessarily depend upon all the facts in the light of the statutory provisions.

§ 779.224 Common control in other cases.

(a) As stated in § 779.215 "common control" may exist with or without ownership. The actual control of the performance of the related activities is sufficient to establish the "control" referred to in the definition. In some cases an owner may actually relinquish his control to another, or by agreement or other arrangement, he may so restrict his right to exercise control as to abandon the control or to share the control of his business activities with other persons or corporations. In such a case, the activities may be performed under "common control." In other cases, the power to control may be reserved through agreement or arrangement between the parties so as to vest the control of the activities of one business in the hands of another.

(b) Activities are considered to be performed under "common control" even if, because of the particular methods of operation, the power to control is only seldom used, as where the business has been in operation for a long time without change in methods of operation and practically no actual direction is necessary; also common control may exist where the control, although rarely visibly exercised, is evidenced by the fact that mere suggestions are adopted readily by the business being controlled.

(c) In the retail industry, particularly, there are many instances where, for business reasons, related activities performed by separate companies are so unified or controlled as to constitute a single enterprise. A common example, specifically named in the definition, is the leased department. This and other examples are discussed in §§ 779.225 through 779.235.

LEASED DEPARTMENTS, FRANCHISE AND OTHER BUSINESS ARRANGEMENTS

§ 779.225 Leased departments.

(a) As stated in section 3(r) of the enterprise includes "departments of an establishment operated through leasing arrangements." This statutory provision is based on the fact that ordinarily the activities of such leased departments are related to the activities of the establishment in which they are located, and they are performed for a common business purpose either through "unified operation" or "common control." A general discussion will be found in Part 776 of this chapter.

(b) In the ordinary case, a retail or service establishment may control many of the operations of a leased department therein and unify its operation with its own. Thus, they may operate under a common trade name: The host establishment may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies; advertising, adjustment and credit operations, may be unified, and insurance, taxes, and other matters may be included as a part of the total operations of the establishment. Some or all of these and other functions, which are the normal prerogatives of an independent businessman, may be controlled or unified with the store's other activities in such a way as to constitute a single enterprise under the Act.

(c) Since the definition specifically includes in the "enterprise," for the purpose of this Act, "departments of an establishment operated through leasing arrangements," any such department will be considered a part of the host establishment's enterprise in the absence of special facts and circumstances warranting a different conclusion.

(d) Whether, in a particular case, the relationship is such as to constitute the lessee's operation to be a separate establishment of a different enterprise rather than a "leased department" of the host establishment as described in the definition, will depend upon all the facts including the agreements and arrangements between the parties as well as the manner in which the operations are conducted. If, for example, the facts show that the lessee occupies a physically separate space with (or even without) a separate entrance, and operates under a separate name, with his own separate employees and records, and in other respects conducts his business independently of the lessor's, the lessee may be operating a separate establishment or place of business of his own and the relationship of the parties may be only that of landlord and tenant. In such a case, the lessee's operation will not be regarded as a "leased department" and will not be included in the same enterprise with the lessor.

(e) The employees of a leased department would not be covered on an enterprise basis if such leased department is located in an establishment which is not itself a covered enterprise or part of a covered enterprise. Likewise, the applicability of exemptions for certain retail or service establishments from the Act's minimum wage or overtime pay provisions, or both, to employees of a leased department would depend upon the character of the establishment in which the leased department is located. Other sections of this subpart discuss the coverage of leased retail and service departments in more detail while Subpart D of this part explains how exemptions for certain retail and service establishments apply to leased department employees.

§ 779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.

While certain franchise and other arrangements may operate to bring the one to whom the franchise is granted into another enterprise (see § 779.232), section 3(r) contains a specific exception for certain arrangements entered into by a retail or service establishment which is under independent ownership. The specific exception in section 3(r) reads as follows:

> *Provided,* That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

§ 779.227 Conditions which must be met for exception.

This exception, in accordance with its specific terms, will apply to exclude an establishment from enterprise coverage only if the following conditions are met:

(a) The establishment must be a "retail or service establishment" as this term is defined in section 13(a)(2) of the Act (see discussion of this term in §§ 779.312 and 779.313); and

(b) The retail or service establishment must not be an "enterprise" which is large enough to come within the scope of section 3(s) of the Act; and

(c) The retail or service establishment must be under independent ownership.

§ 779.228 Types of arrangements contemplated by exception.

If the retail or service establishment meets the requirements in paragraphs (a) through (c) of § 779.227, it may enter into the following arrangements without becoming a part of the larger enterprise, that is, without losing its status as a "separate and distinct enterprise" to which section 3(s) would not otherwise apply:

(a) Any arrangement, whether by agreement, franchise or otherwise, that it will sell, or sell only certain goods specified by a particular manufacturer, distributor, or advertiser.

(b) Any such arrangement that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area.

(c) Any such arrangement by which it will join with other similar retail or service establishments in the same industry for the purpose of collective purchasing. Where an agreement for "collective purchasing" is involved, further requirements are imposed, namely, that all of the other establishments joining in the agreement must be retail or service establishments under independent ownership, and that all of the establishments joining in the collective purchasing arrangement must be "in the same industry." This has reference to such arrangements by a group of grocery stores, or by some other trade group in the retail industry.

(d) Any arrangement whereby the establishment's premises are leased from a person who also leases premises to other retail or service establishments. In connection with this rental arrangement, the Senate Report cites as an example the retail establishment which rents its premises from a shopping center operator (S. Rept. 145, 87th Cong., 1st Sess., p. 41). It is clear that this exception was not intended to apply to the usual leased department in an establishment, which is specifically included within the larger enterprise under the definition of section 3(r). (See discussion under § 779.225.)

§ 779.229 Other arrangements.

With respect to those arrangements specifically described in the proviso contained in the definition, an independently owned retail or service establishment will not be considered to be other than a separate and distinct enterprise, if other arrangements the establishment makes do not have the effect of bringing the establishment within a larger enterprise. Whether or not other arrangements have such an effect will necessarily depend upon all the facts. The Senate Report makes the following observations with respect to this:

> Thus the mere fact that a group of independently owned and operated stores join together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same "enterprise." This is also the case in food retailing because of the great extent to which local independent food store operators have joined together in many phases of their business. While maintaining their stores as independently owned units, they have affiliated together not just for the purchasing of merchandise, but also for providing numerous other services such as (1) central warehousing; (2) advertising; (3) sales promotions; (4) managerial advice; (5) store engineering; (6) accounting systems; (7) site locations; and (8) hospitalization and life insurance protection. (S. Rept. 145, 87th Cong., 1st Sess., p. 42.)

The report continues with the following observations:

> Whether such arrangements bring the establishment within the franchisor's, lessor's, or grantor's "enterprise" is a question to be determined on all the facts. The facts may show that the arrangements reserve the necessary right of control in the grantor or unify the operations among the separate "franchised" establishments so as to create an economic unity of related activities for a common business purpose. In that case, the "franchised" establishment will be consid-

BEST DOCUMENT AVAILABLE

> ered a part of the same "enterprise." For example, whether a franchise, lease, or other contractual arrangement between a distributor and a retail dealer has the effect of bringing the dealer's establishments within the enterprise of the distributor will depend upon the terms of the agreements and the related facts concerning the relationship between the parties.
>
> There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?"
>
> For instance, a bona fide independent automobile dealer will not be considered a part of the enterprise of the automobile manufacturer or of the distributor. Likewise, the same result will also obtain with respect to the independent components of a shopping center.
>
> In all of these cases if it is found on the basis of all the facts and circumstances that the arrangements are so restrictive as to products, prices, profits, or management as to deny the "franchised" establishment the essential prerogatives of the ordinary independent businessman, the establishment, the dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, right, or concession. (S. Rept. 145, 87th Cong., 1st Sess., p. 42.)

Thus, there may be a number of different types of arrangements established in such cases, and the determination as to whether the arrangements create a larger "enterprise" will necessarily depend on all the facts. Some arrangements which do not create a larger enterprise and some which do are discussed in §§ 779.230-779.235.

§ 779.230 Franchise and other arrangements.

(a) There are many different and complex arrangements by which businesses may join to perform their activities for a common purpose. A general discussion will be found in Part 776 of this chapter. The quotation in § 779.229 from the Senate Report shows that Congress recognized that some franchise, lease, or other arrangements have the effect of creating a larger enterprise and whether they do or not depends on the facts. The facts may show that the arrangements are so restrictive as to deprive the individual establishment of those prerogatives which are the essential attributes of an independent business. (Compare Wirtz v. Lunsford, 404 F. 2d, 693 (C.A. 6).) An establishment through such arrangements may transfer sufficient "control" so that it becomes in effect a unit in a unified chain operation. In such cases the result of the arrangement will be to create a larger enterprise composed of the various segments, including the establishment which relinquishes its control.

(b) The term "franchise" is not susceptible of precise definition. The extent to which a businessman relinquishes the control of his business or the extent to which a franchise results in the performance of the activities through unified operation or common control depends upon the terms of the contract and the other relationships between the parties. Ultimately the determination of the precise scope of such arrangements which result in creating larger enterprises rests with the courts.

§ 779.231 Franchise arrangements which do not create a larger enterprise.

(a) While it is clear that in every franchise a businessman surrenders some rights, it equally is clear that every franchise does not create a larger enterprise. In the ordinary case a franchise may involve no more than an agreement to sell the particular product of the one granting the franchise. It may also prohibit the sale of a competing product. Such arrangements, standing alone, do not deprive the individual businessman of his "control" so as to bring him into a larger enterprise with the one granting the franchise.

(b) The portion of the Senate Report quoted in the § 779.229 cites a "bona fide independent automobile dealer" as an example of such a franchise arrangement. (It is recognized that salesmen, mechanics, and partsmen primarily engaged in selling or servicing automobiles, trucks, trailers, farm implements, or aircraft, employed by nonmanufacturing establishments primarily engaged in the business of selling such vehicles to ultimate purchasers are specifically exempt from the overtime pay provisions under section 13(b)(10) of the Act. Section 779.372 discusses the exemption provided by section 13(b)(10) and its application whether or not the establishment meets the Act's definition of a retail or service establishment. The automobile dealer is used here only as an example of the type of franchise arrangement which, within the intent of the Congress, does not result in creating a larger enterprise.) The methods of operation of the independent automobile dealer are widely known. While he operates under a franchise to sell a particular make of automobile and also may be required to stock certain parts and to maintain specified service facilities, it is clear that he retains the control of the management of his business in those respects which characterize an independent businessman. He determines the prices for which he sells his merchandise. Even if prices are suggested by the manufacturer, it is well known that the dealer exercises wide discretion in this respect, free of control by the manufacturer or distributor. Also the automobile dealer retains control with respect to the management of his business, the determination of his employment practices, the operation of his various departments, and his business policies. The type of business in which he is engaged leaves him wide latitude for the exercise of his judgment and for decisions with respect to important aspects of his business upon which its success or failure depends. On the basis of these considerations, it is evident why the independent automobile dealer was cited as an example of the type of franchise which does not create a larger enterprise encompassing the dealer, the manufacturer or the distributor. Similar facts will lead to the same conclusion in other such arrangements.

§ 779.232 Franchise or other arrangements which create a larger enterprise.

(a) In other instances, franchise arrangements do result in bringing a dealer's business into a larger enterprise with the one granting the franchise. Where the franchise arrangement results in vesting control over the operations of the dealer's business in the one granting the franchise, the result is to place the dealer in a larger enterprise with the one granting the franchise. Where there are multiple units to which such franchises have been granted, the several dealers are considered to be subject to the common control of the one granting the franchise and all would be included in the same larger enterprise.

(b) It is not possible to lay down specific rules to determine whether a franchise or other agreement is such that a single enterprise results because all the facts and circumstances must be examined in the light of the definition of the term "enterprise" as discussed above in this subpart. However, the following example illustrates a franchising company and independently owned retail establishments which would constitute a single enterprise:

(1) The franchisor had developed a system of retail food store operations, built up a large volume of buying power, formulated rules and regulations for the successful operation of stores together constituting a system which for many years proved in practice to be of commercial value to the separate stores; and

(2) The franchisor desired to extend its business through the operation of associated franchise stores, by responsible persons in various localities to act as limited agents, and to be parts of the system, to the end that the advantages of and the profits from the business could be enjoyed by those so associated as well as by the franchisor; and

(3) The stores were operated under the franchise as part of the general system and connected with the home office of the franchisor from which general administrative jurisdiction was exercised over all franchised stores, wherever located; and

(4) The stores operated under the franchise agreement were always subject to the general administrative jurisdiction of the franchisor and agreed to comply with it; and

(5) The stores operated under the franchise agreed to install appliances, fixtures, signs, etc. according to plans and specifications provided by the

franchisor and to purchase their merchandise through the franchisor except to the extent that the latter may authorize local purchase of certain items; and

(6) The stores operated under the franchise agreed to participate in special promotions, sales and advertising as directed by the franchisor, to attend meetings of franchise store operators and to pay a fee to the franchisor at the rate of one-half of 1 percent of total gross sales each month for the privileges to them and the advantages and profits derived from operating a local unit of the franchisor's system; and

(7) The franchisor under the franchise agreement had the right to place on a prohibited list any merchandise which it considered undesirable for sale in a franchise store, and the stores operated pursuant to the franchise agreed to immediately discontinue sale of any such blacklisted merchandise.

(c) It is clear from the facts and circumstances surrounding this franchise arrangement described in paragraph (b) of this section that the operators of the franchised establishments are denied the essential prerogatives of the ordinary independent businessman because of restrictions as to products, prices, profits and management. The last paragraph of the Senate Report quoted in § 779.229 makes clear that in such cases the franchised establishment, dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, right, or concession.

§ 779.233 Independent contractors performing work "for" an enterprise.

(a) The definition in section 3(r) specifically provides that the "enterprise" shall not include "the related activities performed for such enterprise by an independent contractor." This exclusion will apply where the related activities are performed "for" the enterprise and if such activities are performed by "an independent contractor." This provision is discussed generally in Part 776 of this chapter.

(b) The Senate Report in referring to this exception states as follows:

> It does not include the related activities performed for such an enterprise by an independent contractor, such as an independent accounting firm or sign service or advertising company, * * * (S. Rept. No. 145, 87th Cong., 1st Sess., p. 40).

The term "independent contractor" as used in section 3(r) has reference to an independent business which performs services for other businesses as an established part of its own business activities. The term "independent contractor" as used in 3(r) thus has reference to an independent business which is a separate "enterprise," and which deals in the ordinary course of its own business operations, at arms length, with the enterprises for which it performs services.

(c) There are many instances in industry where one business performs activities for separate businesses without becoming a part of a larger enterprise. In addition to the examples cited in the Report they may include such services as repairs, window cleaning, transportation, warehousing, collection services, and many others. The essential test in each case will be whether such services are performed "for" the enterprise by an independent, separate enterprise, or whether the related activities are performed for a common purpose through unified operation or common control. In the latter case the activities will be considered performed "by" the enterprise, rather than "for" the enterprise, and will be a part of the enterprise. The distinction in the ordinary case will be readily apparent from the facts. In those cases where questions arise a determination must be made on the basis of all the facts in the light of the statute and the legislative history.

§ 779.234 Establishments whose only regular employees are the owner or members of his immediate family.

Section 3(s) provides that any "establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner" shall not be considered to be an "enterprise" as described in section 3(r) or a part of any other enterprise. Further the sales of such establishment are not included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of section 3(s). The term "other member of the immediate family of such owner" is considered to include relationships such as brother, sister, grandchildren, grandparents, and in-laws but not distant relatives from separate households. The 1966 amendments extended the exception to include family operated establishments which only employ persons other than members of the immediate family infrequently, irregularly, and sporadically. (See general discussion in Part 776 of this chapter.)

§ 779.235 Other "enterprises."

No attempt has been made in the discussion of the term "enterprise," to consider every possible situation which may, within the meaning of section 3(r), constitute an "enterprise" under the Act. The discussion is designed to explain and illustrate the application of the term in some cases; in others, the discussion may serve as a guide in applying the criteria of the definition to the particular fact situation. A more complete discussion is contained in Part 776 of this chapter.

COVERED ENTERPRISES

§ 779.236 In general.

Sections 779.201 through 779.235 discuss the various criteria for determining what business unit or units constitute an "enterprise" within the meaning of the Act. Sections 779.237-779.245 discuss the criteria for determining what constitutes a "covered enterprise" under the Act with respect to the conditions for coverage of those enterprises in which retail sale of goods or services are made. As explained in §§ 779.2 through 779.4, previously covered employment in retail and service enterprises will be subject to different monetary standards than newly covered employment in such enterprises until February 1, 1971. For this reason the enterprise coverage provisions of both the prior and the amended Act are discussed in the following sections of this subpart.

§ 779.237 Enterprise engaged in commerce or in the production of goods for commerce.

Under section 3(s) the "enterprise" to be covered must be an "enterprise engaged in commerce or in the production of goods for commerce." This is defined in section 3(s) as follows:

> Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person * * *.

In order for an enterprise to come within the coverage of the Act, it must, therefore, be established that the enterprise has some employees who are:

(a) Engaged in commerce or in the production of goods for commerce, including

(b) Employees handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person.

The legislative history of the 1966 amendments does not indicate a difference between the meaning of the above wording and the wording used in the prior Act. (See § 779.22.) For a complete discussion of the employees who come within the quoted language see Subpart B of the Interpretative Bulletin on general coverage, Part 776 of this chapter.

§ 779.238 Engagement in described activities determined on annual basis.

As set forth in the preceding section an enterprise to be a "covered enterprise" must have at least some employees engaged in certain described activities. This requirement will be determined on an annual basis in order to give full effect to the intent of Congress. Thus, it is not necessary that the enterprise have two or more employees engaged in the named activities every week. An enterprise described in section 3(s)(1) or (5) of the prior Act or in section 3(s)(1) of the Act as it was amended in 1966 will be considered to have employees engaged in commerce or in the production of goods for commerce, including the handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person, if during the annual period which it uses in calculating its annual sales for purposes of the other conditions of these sections, it regularly and recurrently has at least two or more employees engaged in such activities. On the other hand, it is plain that an enterprise that has employees engaged in such activities only in isolated or sporadic occasions, will not meet this condition.

§ 779.239 Meaning of "engaged in commerce or in the production of goods for commerce."

The term "engaged in commerce or in the production of goods for commerce," as used in section 3(s) of the Act in reference to employees who are so engaged is the same as the term which has been used in the Act for many years. The statutory definitions of these terms are set forth in §§ 779.12 through 779.16. The interpretative bulletin on general coverage (Part 776 of this chapter) contains the Division's interpretations as to which employees are "engaged in commerce or in the production of goods for commerce." These interpretations are equally applicable under section 3(s) in determining which employees are "engaged in commerce or in the production of goods for commerce" within the meaning of this section. A brief discussion of the guiding principles of retail or service establishments are "engaged in commerce or in the production of goods for commerce" is set forth in Subpart B of this part.

EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS THAT HAVE BEEN MOVED IN OR PRODUCED FOR COMMERCE BY ANY PERSON

§ 779.240 Employees "handling * * * or otherwise working on goods."

(a) *"Goods" upon which the described activities are performed.* Employees will be considered to be handling, selling, or otherwise working on goods within the meaning of section 3(s) if they engage in the described activities on "goods" which "have been moved in or produced for commerce by any person." They may be handling or working on such goods which the enterprise does not sell. The term "goods" is defined in section 3(i) of the Act. The definition is explained in § 779.107 and discussed comprehensively in Part 776 of this chapter. As defined in section 3(i) of the Act, the term includes any part or ingredient of "goods" and, in general, includes "articles or subjects of commerce of any character." Thus the term "goods," as used in section 3(s), includes all goods which have been moved in or produced for commerce, such as stock-in-trade, or raw materials that have been moved in or produced for commerce.

(b) *"Handling * * * or otherwise working on goods."* The term "handling * * * or otherwise working on goods" used in section 3(s) is substantially the same as the term used since 1938 in section 3(j) of the Act. Both terms will therefore be considered to have essentially the same meaning. (See Part 776 of this chapter, the interpretative bulletin on the general coverage of the Act.) Thus, the activities encompassed in the term "handling or in any other manner working on goods" in section 3(s) are the same as the activities, encompassed in the similar term in section 3(j), by which goods are "produced" within the meaning of the Act. In general, the term "handling * * * or otherwise working on goods" includes employees who sort, screen, grade, store, pack, label, address, transport, deliver, print, type, or otherwise handle or work on the goods. The same will be true of employees who handle or work on "any part of ingredient of the goods" referred to in the discussion of the term "goods" in § 779.107. An employee will be considered engaged in "handling * * * or otherwise working on goods," within the meaning of section 3(s), only if he performs the described activities on goods that "have been moved in or produced for commerce by any person." This requirement is discussed in §§ 779.242 and 779.243.

§ 779.241 Selling.

The statutory definition of the term "sale" or "sell" is quoted in § 779.15.

As long as the employee in any way participates in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, in a practical sense is an essential part of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods. "Selling" goods, under section 3(s) has reference only to goods which "have been moved in or produced for commerce by any person," as discussed in §§ 779.242 and 779.243.

§ 779.242 Goods that "have been moved in" commerce.

For the purpose of section 3(s), goods will be considered to "have been moved * * * in commerce" when they have moved across State lines before they are handled, sold, or otherwise worked on by the employees. It is immaterial in such a case that the goods may have "come to rest" within the meaning of the term "in commerce" as interpreted in other respects, before they are handled, sold, or otherwise worked on by the employees in the enterprise. Such movement in commerce may take place before they have reached the enterprise, or within the enterprise, such as from a warehouse of the enterprise in one State to a retail store of the same enterprise located in another State. Thus, employees will be considered to be "handling, selling, or otherwise working on goods that have been moved in * * * commerce" where they are engaged in the described activities on "goods" that have moved across State lines at any time in the course of business, such as from the manufacturer to the distributor, or to the "enterprise," or from one establishment to another within the "enterprise." See the general discussion in Part 776 of this chapter.

§ 779.243 Goods that have been "produced for commerce by any person."

An employee will be considered to be handling, selling, or otherwise working on goods that have been "produced for commerce by any person" within the meaning of section 3(s), if he is performing the described activities with respect to goods which have been "produced for commerce" within the meaning of the Act. The term "produced" is defined in section 3(j) of the Act and, as explained above, has a well-established meaning under the existing law. (See § 779.104 and Part 776 of this chapter.) The word as it is used in the context of the phrase "goods * * * produced for commerce by any person" in section 3(s) has the same meaning as in 3(j). Therefore, where goods are considered "produced for commerce" within the meaning of section 3(j) of the Act they also will be considered "produced for commerce" within the meaning of section 3(s). A discussion of when goods are produced for commerce within the meaning of section 3(j) is contained in § 779.108. Of course, within the meaning of section 3(s), the goods will be considered "produced for commerce" when they are so produced "by any person."

COVERED RETAIL ENTERPRISE

§ 779.244 "Covered enterprises" of interest to retailers of goods or services.

Retailers of goods or services are primarily concerned with the enterprises described in sections 3(s)(1) and 3(s)(5) of the prior Act and section 3(s)(1) of the Act as amended in 1966. Although section 3(s)(1) of the prior Act (under the 1961 amendments) had exclusive application to the retail and service industry, section 3(s)(1) of the Act as amended in 1966 may apply to any enterprise. This part is concerned only with retail or service establishments and enterprises. Enterprises described in clauses (2), (3), and (4) of section 3(s) are discussed herein only with respect to the application to them of provisions relating to retail or service establishments. Coverage of such enterprises and the application of section 3(s)(1) of the amended Act to enterprises generally are discussed in Part 776 of this chapter. The statutory definitions of enterprises of interest to retailers under the prior Act and the Act as amended in 1966 are quoted in § 779.22.

§ 779.245 Conditions for coverage of retail or service enterprises.

(a) Retail or service enterprises may be covered under section 3(s)(1) of the prior Act or section 3(s)(1) of the amended Act although the latter is not limited to retail or service enterprises. A retail or service enterprise will be a covered enterprise under section 3(s)(1) of the amended Act if both the following conditions are met:

(1) The enterprise is "an enterprise engaged in commerce or in the production of goods for commerce." This requirement, which is discussed in §§ 779.237 through 779.243, applies to all covered enterprises under the provisions of both the prior and the amended Act; and,

(2) During the period February 1, 1967, through January 31, 1969, the enterprise has an annual gross volume of sales made or business done, exclusive of excise taxes at the retail level which are separately stated, of at least $500,000; or on and after February 1, 1969, the enterprise has an annual gross volume of sales made or business done of at least $250,000, exclusive of excise taxes at the retail level which are separately stated.

(b) A retail or service enterprise will be covered under section 3(s)(1) of the Act prior to the amendments if all four of the following conditions are met:

(1) The enterprise is "an enterprise engaged in commerce or in the production of goods for commerce" as explained above in paragraph (a)(1) of this section and,

(2) The enterprise has one or more "retail or service establishments" (the statutory definition of the term "retail or service establishment" is contained in § 779.24 and discussed in Subpart D of this part) and,

(3) The enterprise has an annual gross volume of sales of $1 million or more, exclusive of excise taxes at the retail level which are separately stated and,

(4) The enterprise "purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more." (This requirement is discussed in §§ 779.246 through 779.253.)

(c) Sections 779.258 through 779.260 discuss the meaning of "annual gross volume of sales made or business done" and §§ 779.261 through 779.264 discuss what excise taxes may be excluded from the annual gross volume. Sections 779.265 through 779.269 discuss the method of computing the annual gross volume where it is necessary to determine monetary obligations to employees under the Act.

INTERSTATE INFLOW TEST UNDER PRIOR ACT

§ 779.246 Inflow test under section 3(s)(1) of the Act prior to 1966 amendments.

To come within the scope of section 3(s)(1) of the prior Act, the enterprise, in addition to the other conditions, must purchase or receive goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more. To meet this condition, it must be shown that (a) the enterprise purchases or receives goods for resale (§ 779.248), (b) that such goods move or have moved across State lines (§ 779.249), and (c) that such purchases and receipts amount in total annual volume to $250,000 or more (§ 779.253). Enterprises which do not meet this test may be covered under section 3(s)(1) of the present Act, which contains no interstate inflow requirement.

§ 779.247 "Goods" defined.

The term "goods" as used in section 3(s) of the prior and amended Act is defined in section 3(i) of the Act. The statutory definition is quoted in § 779.14, and is discussed in detail in Part 776 of this chapter.

§ 779.248 Purchase or receive "goods for resale."

(a) Goods will be considered purchased or received "for resale" for purposes of the inflow test contained in section 3(s)(1) of the prior Act if they are purchased or received with the intention of being resold. This includes goods, such as stock in trade which is purchased or received by the enterprise for resale in the ordinary course of business. It does not include machinery, equipment, supplies, and other goods which the enterprise purchases to use in conducting its business. This is true even if such capital goods or other equipment, which the enterprise originally purchased for use in conducting its business, are at some later date actually resold. The distinction is to be found in whether the goods are purchased or received by the enterprise with the intention of reselling them in the same form or after further processing or manufacturing, or whether they are purchased with the intent of being consumed or used by the enterprise itself in the performance of its activities.

(b) Goods, such as raw materials or ingredients, are considered purchased or received by the enterprise "for resale," even if such goods are purchased or received for the purpose of being processed or used as parts or ingredients in the manufacture of other goods which the enterprise intends to sell. For example, where the enterprise purchases flour for use in baking bread or pastries for sale, the goods will be considered to have been purchased "for resale." It is immaterial whether the goods will be resold by the enterprise at retail or at wholesale.

§ 779.249 Goods which move or have moved across State lines.

In order to be included in the annual dollar volume for purposes of this test, the goods which the enterprise purchases or receives for resale must be goods that "move or have moved across the State lines." Goods which have not moved across State lines before they are resold by the enterprise will not be included. The movement to which the phrase "move or have moved" has reference is that movement which the goods follow in their journey to the enterprise or within the enterprise to the establishment which sells the goods. Thus, if goods have moved across State lines at some stage in the flow of trade before they are actually sold by the enterprise, they will be considered to have moved across State lines. It is not material that the goods may have "come to rest" at some time before they are purchased or received and sold by the enterprise; nor is it material that some time may have elapsed between the time the goods have moved across State lines and the time they are purchased or received and sold by the enterprise. It is sufficient if at any time such goods have moved across State lines in the ordinary course of trade before resale by the enterprise. Much of the goods purchased by retailers are produced from a local intrastate supplier. In many instances these goods may have been stored at the supplier's establishment for some time. However, as long as the particular goods purchased have moved across State lines at some stage in the flow of trade to the retailer, they would have to be included in determining whether or not the enterprise has purchased or received for resale such out-of-State goods amounting to $250,000.

§ 779.250 Goods that have not lost their out-of-State identity.

Goods which are purchased or received by the enterprise from within the State will be considered goods which "have moved across State lines" if they have previously been moved across State lines and have not lost their identity as out-of-State goods before they are purchased or received by the enterprise. Also goods which have been assembled within the State after they were moved across State lines but before they are purchased or received by the enterprise will still be regarded as goods which "have moved across State lines." Such goods are still identifiable as goods brought into the State. This is also true in certain cases where goods are processed to some extent without losing their identity as out-of-State goods. For example, out-of-State furniture or television sets which are put together within the State, or milk from outside the State which is pasteurized and bottled within the State, before being purchased or received by the enterprise, are goods which "have moved across State lines." They have already moved across State lines and they retain their out-of-State identity, despite the assembly or processing within the State.

§ 779.251 Goods that have lost their out-of-State identity.

(a) Goods which are purchased or received by the enterprise within the State will not be considered goods which have "moved across State lines" if the goods, although they came from outside the State, had been processed or manufactured so as to have lost their identity as out-of-State goods before they are purchased or received by the enterprise. This assumes, of course, that the goods so manufactured or processed do not move across State lines before they are sold by the enterprise. Thus where an enterprise buys bread baked within the State which does not move across State lines before it is resold by the enterprise, the bread is not "goods, which have moved across State lines" even if the flour and other ingredients came from outside the State. The same conclusion will follow, under the same circumstances, where clothing is manufactured from out-of-State fabrics.

(b) In those cases where goods are composed in part of goods which have, and in part of goods which have not, moved across State lines, the entire product will be considered as goods which have moved across State lines, if, as a practical matter, it substantially consists of goods which are identifiable as out-of-State goods. Whether goods have been so changed as to have lost their out-of-State identity is question which will depend upon all the facts in a particular case.

§ 779.252 Not in deliveries from the reselling establishment.

Goods which move across State lines only in the course of deliveries from the reselling establishment of the enterprise are not included as goods which "move or have moved across State lines." Thus, goods delivered by the enterprise to its customers outside of the State are not, for that reason, considered goods which "move or have moved across State lines." The purpose of the provision excepting "deliveries from the reselling establishment" is to limit the test to goods which flow into the enterprise and to exclude those goods which only cross State lines when they flow out of the enterprise as an incident of the sale of such goods by the enterprise. In other words, this is an inflow test and not an outflow test.

§ 779.253 What is included in computing the total annual inflow volume.

The goods which the establishment purchases or receives for resale that move or have moved across State lines must "amount in total annual volume to $250,000 or more." It will be noted that taxes are not excluded in measuring this annual dollar volume. Thus, the total cost to the enterprise of such goods will be included in calculating the $250,000. This will include all taxes and other charges which the enterprise must pay for such goods. Generally, all charges will be included in the invoice of the goods. But whether included in the invoice or not, the total amount which the enterprise is required to pay for such goods, including charges for transportation, insurance, delivery, storage and any other will be included in computing the $250,000. The dollar volume of the goods purchased or received by the enterprise is the "annual" volume. The method of calculating the annual dollar volume is explained in § 779.266.

THE GASOLINE SERVICE ESTABLISHMENT ENTERPRISE

§ 779.254 Summary of coverage and exemptions prior to and following the 1966 amendments.

The ordinary gasoline service establishment is a covered enterprise under the Act if it has an annual gross volume of sales made or business done of not less than $250,000 a year, exclusive of excise taxes at the retail level which are separately stated, and meets the other tests of section 3(s)(5) of the prior Act and section 3(s)(1) of the amended Act. Beginning February 1, 1969, enterprise coverage extends to any gasoline service establishment in an enterprise which has an annual gross volume in such amount, even if the establishment's annual gross volume is less. However, a gasoline service establishment with gross sales of less than $250,000, exclusive of excise taxes at the retail level which are separately stated, may qualify for the minimum wage and overtime pay exemption provided in section 13(a)(2) of the Act if it meets the requirements of that section. Section 779.313 summarizes the requirements. An overtime pay exemption, which was repealed by the 1966 amendments, existed until February 1, 1967, for employees of ordinary gasoline service establishments under the prior Act. Thus, nonexempt employees of a covered gasoline service establishment enterprise are subject to the minimum wage standards for previously covered employment and the overtime pay requirements for newly covered employment as listed below:

Minimum wage—	Beginning
$1.40 an hour	February 1, 1967.
$1.60 an hour	February 1, 1968 and thereafter.
Overtime pay after—	
44 hours in a workweek	February 1, 1967.
42 hours in a workweek	February 1, 1968.
40 hours in a workweek	February 1, 1969 and thereafter.

The particular considerations affecting coverage and exemptions are discussed in subsequent sections. The statutory language contained in section 3(s)(5) of the prior Act and 3(s)(1) of the amended Act may be found in § 779.22.

§ 779.255 Meaning of "gasoline service establishment."

(a) A gasoline service station or establishment is one which is typically a physically separate place of business engaged primarily ("primarily" meaning 50 percent or more) in selling gasoline and lubricating oils to the general public at the station or establishment. It may also sell other merchandise or perform minor repair work as an incidental part of the business. (See S. Rept. 145, 87th Cong., first session, p. 32.) No difference in application of the terms "gasoline service establishment" and "gasoline service station" was intended by Congress (see Senate Report cited above) and both carry the same meaning.

(b) Under section 3(s)(5) of the prior Act and until February 1, 1969, under section 3(s)(1) of the amended Act, the covered enterprise is always a single establishment—a gasoline service establishment, even though such establishment may be a part of some larger enterprise for purposes of other provisions of the "enterprise" coverage of the new amendments. As noted above this term refers to what is commonly known as a gasoline service station, a separate "establishment." What constitutes a separate establishment is discussed in §§ 779.303 through 779.306. While receipts from incidental sales and services are included and counted in determining the establishment's annual gross volume of sales for purposes of enterprise coverage, the establishment's primary source of receipts must be from the sale of gasoline and lubricating oils. (See Senate Report cited above.) An establishment which derives the greater part of its income from the sales of goods other than gasoline or lubricating oils will not be considered a "gasoline service establishment." The mere fact that an establishment has a gasoline pump as an incidental part of other business activities in which it is principally engaged does not constitute it "a gasoline service establishment" within the meaning and for the purposes of these sections.

§ 779.256 Conditions for enterprise coverage of gasoline service establishments.

(a) The requirement that the enterprise must be "an enterprise engaged in commerce or in the production of goods for commerce" is discussed in §§ 779.237 through 779.243. Those sections explain which employees are engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person. In connection with the discussion in those sections as it concerns employees of gasoline service establishments, it should be noted that as a general rule such employees normally are "engaged in commerce or in the production of goods for commerce" within the meaning of the Act. For example, gasoline filling station employees servicing motor vehicles used in interstate transportation or in the production of goods for commerce have always been regarded as being

BEST DOCUMENT AVAILABLE

"engaged in commerce or in the production of goods for commerce" within the meaning of the Act. Such employees will also be considered as engaged in handling, selling or otherwise working on goods that have been moved in or produced for commerce by any person, if the gasoline or lubricating oils or the other goods with respect to which they perform the described activities have come from outside the State in which the establishment is located.

(b) For periods before February 1, 1969, a gasoline service establishment was within the scope of the enterprise coverage provisions of the Act only if its annual gross volume of sales was not less than $250,000, exclusive of excise taxes at the retail level which are separately stated. Until such date, a gasoline service establishment which did not have such an annual gross volume of sales was not a covered enterprise, and enterprise coverage did not extend to it by virtue of the fact that it is an establishment of an enterprise which meets coverage tests of section 3(s). In determining whether the establishment has the requisite annual gross volume of sales the receipts from all sales of the establishment are included without limitation to the receipts from sales of gasoline and lubricating oil. In computing the annual gross volume of sales the gross receipts from all types of sales during a 12-month period are included. These gross receipts are measured by the price paid by the purchaser of the goods or services sold by the establishment (Sen. Rept. 1487, 89th Cong. second session p. 7). Thus, where the establishment sells gasoline for an oil company on commission, annual gross volume is based on the retail sale price and not on the smaller amount retained or received as commissions. A further discussion of what sales are included in the annual gross volume is contained in §§ 779.258 through 779.260.

(c) In computing the annual gross volume of sales, excise taxes at the retail level which are separately stated are not counted. A discussion of the excise taxes which may be excluded under this provision is contained in §§ 779.261 through 779.264. Whether the particular taxes are "excise taxes at the retail level" depends upon the facts in each case. If the taxes are "excise taxes at the retail level" they will be excludable only if they are "separately stated." Where a gasoline station posts a sign on or alongside the gasoline pumps indicating that a certain amount per gallon is for a specific excise tax, this will meet the requirement of being "separately stated". The method of calculating annual gross volume of sales is explained in greater detail in §§ 779.265 through 779.269.

§ 779.257 Exemption applicable to gasoline service establishments under the prior Act.

Section 13(b)(8) of the prior Act (before the 1966 amendments) contained an exemption from the overtime pay requirements for "any employee of a gasoline service station". This exemption was applicable prior to February 1, 1967, without regard to the annual gross volume of sales of the gasoline service station by which the employee was employed. The removal of this exemption by the 1966 amendments brought non-exempt employees of covered gasoline service stations within the purview of the overtime requirements of the Act for the first time.

ANNUAL GROSS VOLUME OF SALES MADE OR BUSINESS DONE

§ 779.258 Sales made or business done.

The Senate Report on the 1966 amendments reaffirmed the intent to measure the "dollar volume of sales or business" including "the gross receipts or gross business" to determine whether an enterprise is covered. This concept was first expressed in the Senate Report on the 1961 amendment (S. Rept. No. 145, 87th Congress, first session, p. 38). The phrase "business done" added by the 1966 amendments to section 3(s) merely reflects with more clarity the economic test of business size expressed in the prior Act in terms of "annual gross volume of sales" and conforms the language of the Act with the Congressional view expressed in the legislative history of the 1961 amendments. Thus, the annual gross volume of an enterprise must include any business activity in which it engages which can be measured on a dollar basis irrespective of whether the enterprise is tested under the prior or amended Act. The Senate Report on the 1966 amendments states:

> The intent to measure the "dollar volume of sales or business" including the "gross receipts or gross business" in determining coverage of such an enterprise was expressed in the Senate report above cited at page 38. The addition of the term "business done" to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue to include both the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, as measured by the price paid by the purchaser for the property or service sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind. (S. Rept. No. 1487, 89th Congress, second session, pp. 7-8.)

§ 779.259 What is included in annual gross volume.

(a) The annual gross volume of sales made or business done of an enterprise consists of its gross receipts from all types of sales made and business done during a 12-month period. The gross volume of sales made or business done means the gross dollar volume (not limited to income) derived from all sales and business transactions including, for example, gross receipts from service, credit, or other similar charges. Credits for goods returned or exchanged and rebates and discounts, and the like, are not ordinarily included in the annual gross volume of sales or business. The gross volume of sales or business includes the receipts from sales made or business done by the retail or service establishments of the enterprise as well as the sales made or business done by any other establishments of the enterprise, exclusive of the internal transactions between them. Gross volume is measured by the price paid by the purchaser for the property or service sold to him, as stated in the Senate Committee Report (§ 779.258). It is not measured by profit on goods sold or commissions on sales made for others. The dollar value of sales or business of the entire enterprise in all establishments is added together to determine whether the applicable dollar test is met. The fact that one or more of the retail or service establishments of the enterprise may have less than $250,000 in annual dollar volume and may meet the other requirements for exemption from the pay provisions of the Act under section 13(a)(2), does not exclude the dollar volume of sales or business of that establishment from the annual gross volume of the enterprise. However, the dollar volume of an establishment derived from transactions with other establishments in the same enterprise does not ordinarily constitute part of the annual gross volume of the enterprise as a whole. The computation of the annual gross volume of sales or business of the enterprise is made "exclusive of excise taxes at the retail level which are separately stated". The taxes which may be excluded are discussed in §§ 779.261 through 779.264. The methods of calculating the annual gross volume of sales of an enterprise are set forth in §§ 779.265 through 779.269.

(b) In the ordinary case the functions of a leased department are controlled or unified in such a way that it is included in the establishment and therefore in the enterprise in which it is located, as discussed in § 779.225. The applicability of enterprise coverage and certain exemptions to such a leased department depends upon the enterprise coverage and the exemption status of the establishment in which the leased department is located. The annual gross volume of such a leased department is included in the annual gross volume of the establishment in which it is located as well as in the annual gross volume of the enterprise of which such establishment is a part.

(c) Likewise, where franchise or other arrangements result in the creation of a larger enterprise by means of operational restrictions so that the establishment, dealer, or concessionaire is an integral part of the related activities of the enterprise which grants the franchise, right, or concession, as discussed in §§ 779.229 and 779.232, it will follow that the annual gross volume of sales made or business done of such an enterprise includes the dollar volume of sales or business of each related establishment dealer, or concessionaire.

§ 779.260 Trade-in allowances.

Where merchandise is taken in trade when a sale is made, the annual gross volume of sales or business will include the gross amount of the sale before deduction of the allowance on such trade-in merchandise. This is so even though an overallowance or excessive value is allowed on the trade-in merchandise. In turn, when the trade-in merchandise is sold the amount of the sale will be included in the annual gross volume.

EXCISE TAXES

§ 779.261 Statutory provision.

Sections 3(s)(1) and 13(a)(2) of the amended Act as well as sections 3(s)(1), 3(s)(2), 3(s)(5), and 13(a)(2)(iv) of the prior Act provide for the exclusion of "excise taxes at the retail level which are separately stated" in computing the gross annual volume of sales or business or the annual dollar volume of sales for purposes of certain of the provisions contained in those sections. The Senate Committee report states as follows with respect to this provision:

> * * * in determining whether the enterprise or establishment, as the case may be, has the requisite annual dollar volume of sales, excise taxes will not be counted if they are taxes that are collected at the retail level and are separately identified in the price charged the customer for the goods or services at the time of the sale. Excise taxes which are levied at the manufacturer's, wholesaler's, or other distributive level will not be excluded in calculating the dollar volume of sales nor will excise taxes be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. (S. Rept., 145, 87th Cong., first session, p. 39.)

In applying the above rules to determine annual gross volume of sales or business under section 3(s) or annual dollar volume of sales for purposes of the $250,000 test under section 13(a)(2), excise taxes which (a) are levied at the retail level and (b) are separately stated and identified in the charge to the customer at the time of sale need not be included in the calculation of the gross or dollar volume of sales. Excise taxes which are levied at the manufacturer's, wholesaler's or other distributive level will not, ordinarily, be excluded in calculating the volume of sales, nor will excise taxes, even if levied at the retail level, be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. Excise taxes will be excludable whether they are levied by the Federal, State, or local government provided that the tax is "levied at the retail level" and "separately stated".

§ 779.262 Excise taxes at the retail level.

(a) Federal excise taxes are imposed at the retail level on highway vehicle fuels other than gasoline under the provisions of 26 U.S.C. 4041. Such excise taxes are levied at the retail level on any liquid fuel sold for use, or used in a diesel-powered highway vehicle. A similar tax is imposed on the sale of such special motor fuels as benzene and liquefied petroleum gas when used as a motor fuel. To the extent that these taxes are separately stated to the customer, they may be excluded from gross volume of sales. The extent to which State taxes are levied at the retail level, and thus excludable when separately stated, depends, of course, upon the law of the State concerned. However, as a general rule, State, county, and municipal sales taxes are levied at the retail level, and to the extent that they are separately stated, may be excluded. All State excise taxes on gasoline are, for purposes of section 3(s), taxes levied at the retail level, which, if separately stated, may be excluded.

(b) The circumstances surrounding the levying and collection of the Federal excise taxes on gasoline, tires, and inner tubes reflect that, although they are listed under the title of "Manufacturers Excise Taxes," they are, in practical operation, taxes "at the retail level." Federal excise taxes on gasoline, tires, and inner tubes, when "separately stated," may therefore be excluded in computing the annual gross volume of an enterprise for the purpose of determining coverage under section 3(s)(1) of the Act and section 13(a)(2) for purposes of applying the $250,000 test for determining the retail and service establishment exemption of an establishment in a covered enterprise.

§ 779.263 Excise taxes not at the retail level.

There are also a wide variety of taxes levied at the manufacturer's or distributor's level and not at the retail level. It should be noted, however, that the circumstances surrounding the levying and collection of taxes must be carefully considered. The facts concerning the levying and collection of Federal excise taxes on alcoholic beverages and tobacco reflect that such taxes are upon the manufacture of these products and that they are neither levied nor collected at the retail level and thus are not excludable. However, in some cases the circumstances may reflect that despite the fact that such taxes may be levied upon the manufacturer or distributor, nevertheless they may be, in practical operation, taxes at the retail level and may be so regarded for the purpose of this provision.

§ 779.264 Excise taxes separately stated.

A tax is separately stated where it clearly appears that it has been added to the sales price as a separate, identifiable amount, even though there was no invoice or sales slip. In the absence of a sales slip or invoice, the amount of the tax may either be separately stated orally at the time of sale, or visually by means of a poster or other sign reasonable designed to inform the purchaser that the amount of the tax, either as a stated sum per unit or measured by the gross amount of the sale, or as a percentage of the price, is included in the sales price. A sign on a gasoline pump indicating in cents per gallon the amount of State and Federal highway fuel excise taxes is an example of "separately stated" taxes.

COMPUTING THE ANNUAL VOLUME

§ 779.265 Basis for making computations.

The annual gross dollar volume of sales made or business done of an enterprise or establishment consists of the gross receipts from all of its sales or its volume of business done during a 12-month period. Where a computation of the annual gross volume is necessary to determine monetary obligations to employees under the Act whether in an enterprise which has one or more retail or service establishments, or in any establishment in such enterprise, or in any gasoline service establishment, it must be based on the most recent prior experience which it is practicable to use. This was recognized in the Congress when the legislation was under consideration. (S. Rept. No. 145, 87th Cong., first session, p. 38 discusses in detail the calculation of the annual gross volume.) When gross receipts of an enterprise show that the annual dollar volume of sales made or business done meets the statutory tests for coverage and nonexemption, the employer must comply with the Act's monetary provisions from that time on or until such time as the tests are not met. (See § 779.266.)

§ 779.266 Methods of computing annual volume of sales or business.

(a) No computations of annual gross dollar volume are necessary to determine coverage or exemption in those enterprises in which the gross receipts regularly derived each year from the business are known by the employers to be substantially in excess or substantially under the minimum dollar volume specified in the applicable provision of the Act. Also, where the enterprise or establishment, during the portion of its current income tax year up to the end of the current payroll period, has already had a gross volume of sales or business in excess of the dollar amount specified in the statute, it is plain that its annual dollar volume currently is in excess of the statutory amount, and that the Act applies accordingly. The computation described in paragraph (b) of this section, therefore need not be made. Nor is it required where the enterprise or establishment has not yet in such current year exceeded the statutory amount in its gross volume of sales or business, if it has had, in the most recently ended year used by it for income tax purposes, a gross volume of sales made and business done in excess of the amount specified in the Act. In such event, the enterprise or establishment will be deemed to have an annual gross volume in excess of the statutory amount unless the employer establishes, through use of the method set forth in paragraph (b) of this section, an annual gross volume of sales made or business done which is less than the amount specified in the Act. The method described in paragraph (b) of this section shall be used, as intended by the Congress (see S. Rept. 145, 87th Cong. first session, p. 38), for computation of annual dollar volume in all cases when such a computation becomes necessary in order to determine the applicability of provisions of the Act.

(b) In order to determine, when there may be doubt, whether an enterprise or establishment has an annual gross volume of sales made or business done in excess of the amount specified in the statute, and analysis will be made at the beginning of each quarter-year so that the employer will know whether or not the dollar volume tests have been met for the purpose of complying with the law in the workweeks ending in the current quarter-year. The total of the gross receipts from all its sales or business during a 12-month period which immediately precedes the quarter-year being tested will be the basis for analysis. When it is necessary to make a determination for enterprises or establishments which are operated on a calendar year basis for income tax or sales or other accounting purposes the quarter-year periods tested will coincide with the calendar quarters (January 1-March 31; April 1-June 30; July 1-September 30; October 1-December 31). On the other hand, where enterprises or establishments are operated on a fiscal year basis, which consists of an annual period different from the calendar year, the four quarters of the fiscal period will be used in lieu of calendar quarters in computing the annual volume. Once either basis has been adopted it must be used in making subsequent calculations. The sales records maintained as a result of the accounting procedures used for tax or other business purposes may be utilized in computing the annual dollar volume provided the same accounting procedure is used consistently and that such procedure accurately reflects the annual volume of sales or business.

§ 779.267 Fluctuations in annual gross volume affecting enterprise coverage and establishment exemptions.

It is possible that the analysis performed at the beginning of each quarter to determine the applicability of the monetary provisions of the Act may reveal changes in the annual gross volume or other determinative factors which result in the enterprise or establishment meeting or ceasing to meet one or more of the tests for enterprise coverage or establishment exemption. Thus, enterprise coverage may result where the annual volume increases from an amount under to an amount over $250,000. Also, an enterprise having an annual gross volume of more than $1 million and meeting the requirements for a covered retail enterprise under the prior Act on the basis of previous sales analyses may fall below $1 million when the annual gross volume is computed at the beginning of the quarter being tested and as a result qualify only as a newly covered enterprise for the current quarter under the amended Act. Similarly, an enterprise previously subject to new coverage pay standards, having an annual gross volume of more than $250,000 but less than $1 million on the basis of previous sales analyses, may increase its annual gross volume to $1 million or more when recomputed at the beginning of the quarter being tested. It will thus become for the current quarter an enterprise in which employees are subject to the pay standards for employment covered under the Act prior to the amendments, provided that it meets the other conditions as discussed in § 779.245.

§ 779.268 Grace period of 1 month for computation.

Where it is not practicable to compute the annual gross volume of sales or business under paragraph (b) of § 779.266 in time to determine obligations under the Act for the current quarter, an enterprise or establishment may use a 1-month grace period. If this 1-month grace period is used, the computations made under this section will determine its obligations under the Act for the 3-month period commencing 1 month after the end of the preceding calendar or fiscal quarter. Once adopted the same basis must be used for each successive 3-month period.

§ 779.269 Computations for a new business.

When a new business is commenced the employer will necessarily be unable for a time to determine its annual dollar volume on the basis of a full 12-month period as described above. In many cases it is readily apparent that the enterprise or establishment will or will not have the requisite annual dollar volume specified in the Act. For example, where the new business consists of a large department store, or a supermarket, it may be clear from the outset that the business will meet the annual dollar volume tests so as to be subject to the requirements of the Act. In other cases, where doubt exists, the gross receipts of the new business during the first quarter year in which it has been in operation will be taken as representative of its annual dollar volume, in applying the annual volume tests of sections 3(s) and 13(a)(2), for purposes of determining its obligations under the Act in workweeks falling in the following quarter year period. Similarly, for purposes of determining its obligations under the Act in workweeks falling within ensuing quarter year periods, the gross receipts of the new business for the completed quarter year periods will be taken as representative of its annual dollar volume in applying the annual volume tests of the Act. After the new business has been in operation for a full calendar or fiscal year, the analysis can be made by the method described in paragraph (b) of § 779.266 with use of the grace period described in § 779.268, if necessary.

Subpart D—Exemptions for Certain Retail or Service Establishments

GENERAL PRINCIPLES

§ 779.300 Purpose of subpart.

Subpart C of this part has discussed the various criteria for determining coverage under the Act of employers and employees in enterprises and establishments that make retail sales of goods and services. This subpart deals primarily with the exemptions from the Act's minimum wage and overtime provisions found in section 13(a) (2), (4), (11), and 13(b)(18) for employees of retail or service establishments. Also discussed are some exemptions for special categories of establishments engaged in retailing goods or services, which do not require for exemption that the particular establishment be a retail or service establishment as defined in the Act. If all the requirements set forth in any of these exemptions are met, to the extent provided therein the employer is relieved from complying with the minimum wage and/or overtime provisions of the Act even though his employees are engaged in interstate or foreign commerce or in the production of goods for such commerce or employed in covered enterprises.

§ 779.301 Statutory provisions.

(a) Section 13(a) (2), (4), (11), and section 13(b)(18) of the Act, as amended, grant exemption from the minimum wage provisions of section 6 and the maximum hours provisions of section 7 as follows:

(1) Section 13(a)(2) exempts from minimum wages and overtime pay:

> Any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment

is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

(2) Section 13(a)(4) exempts from minimum wages and overtime pay:

> Any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this sub-section and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided,* That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located.

(3) Section 13(a)(11) exempts from minimum wages and overtime pay:

> Any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under clause (2) of this subsection with respect to whom the provisions of sections 6 and 7 would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month.

(4) Section 13(b)(18) exempts from overtime pay only:

> Any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs.

(b) Sections 13(a) (2), (4), (13), (19), and (20) of the prior Act granted exemptions from both the minimum wage provisions of section 6 and the maximum hours provisions of section 7 as follows:

(1) Section 13(a)(2) exempted:

> Any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located, if such establishment—
>
> (i) Is not in an enterprise described in section 3(s), or
>
> (ii) Is in such an enterprise and is a hotel, motel or restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or
>
> (iii) Is in such an enterprise and is a hospital, or an institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective, residing on the premises of such institution, or a school for physically or mentally handicapped or gifted children, or
>
> (iv) Is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.
>
> A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry.

(2) Section 13(a)(4) provided the same exemption as it now does.

(3) Section 13(a)(13) provided the same exemption as section 13(a)(11) of the present Act.

(4) Section 13(a)(19) exempted:

> "Any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements."

(5) Section 13(a)(20) exempted those employees who are now exempt from the overtime provisions only under section 13(b)(18) of the present Act.

(c) Employees who were exempt from the minimum wage and overtime pay requirements under a provision of the prior Act set forth in paragraph (b) of this section, but are no longer exempt from one or both of such requirements under the present Act must be paid minimum wages or overtime pay, as the case may be, in accordance with the pay standards provided for newly covered employment, in any workweek when they perform work within the individual or enterprise coverage of the Act.

"ESTABLISHMENT" BASIS OF EXEMPTIONS

§ 779.302 Exemptions depend on character of establishment.

Some exemptions depend on the character of the establishment by which an employee is employed. These include the "retail or service establishment" exemptions in sections 13(a) (2), (4), and (11) and the exemptions available to the establishments of the character specified in sections 13(a) (3), (9), and 13(b)(8) (first part). Therefore, if the establishment meets the tests enumerated in these sections, employees "employed by" that establishment are generally exempt from sections 6 and 7. (See §§ 779.307 to 779.309 discussing "employed by.") Other exemptions establish two criteria, the character of the establishment and the nature of the conditions of the employment of the particular employee. Such exemptions are set forth in section 13(b)(8) (second part), and section 13(b)(18) and (19). To determine whether the exemptions of these sections apply it is necessary to determine both that the establishment meets the enumerated tests and that the employee is engaged in the enumerated activities or employed under the conditions specified. Thus, under section 13(b)(18) some of the employees of a given employer may be exempt from the overtime pay requirements (but not the minimum wage) of the Act, while others may not.

§ 779.303 "Establishment" defined; distinguished from "enterprise" and "business."

As previously stated in § 779.23, the term "establishment" as used in the Act means a distinct physical place of business. The "enterprise," by reason of the definition contained in section 3(r) of the Act and the tests enumerated in section 3(s) of the Act, may be composed of a single establishment. The term "establishment," however, is not synonymous with the words "business" or "enterprise" when those terms are used to describe multiunit operations. In such a multiunit operation some of the establishments may qualify for exemption, others may not. For example, a manufacturer may operate a plant for production of its goods, a separate warehouse for storage and distribution, and several stores from which its products are sold. Each such physically separate place of business is a separate establishment. In the case of chain store systems, branch stores, groups of independent stores organized to carry on business in a manner similar to chain store systems, and retail outlets operated by manufacturing or distributing concerns, each separate place of business ordinarily is a separate establishment.

§ 779.304 Illustrations of a single establishment.

(a) The unit store ordinarily will constitute the establishment contemplated by the exemptions. The mere fact that a store is departmentalized will not alter the rule. For example, the typical large department store carries a wide variety of lines which ordinarily are segregated or departmentalized not only as to location within the store, but also as to operation and records. Where such departments are operated as integral parts of a unit, the departmentalized unit taken as a whole ordinarily will be considered to be the establishment contemplated by the exemptions, even if there is diversity of ownership of some of the departments, such as leased departments.

(b) Some stores, such as bakery or tailor shops, may produce goods in a back room and sell them in the adjoining front room. In such cases if there is unity of ownership and if the back room and the front room are operated by the employer as a single store, the entire premises ordinarily will be considered to be a single establishment for purposes of the tests of the exemption, notwithstanding the fact that the two functions of making and selling the goods, are separated by a partition or a wall. (See H. Mgrs. St., 1949, p. 27.)

§ 779.305 Separate establishments on the same premises.

Although, as stated in the preceding section, two or more departments of a business may constitute a single establishment, two or more physically separated portions of a business though located on the same premises, and even under the same roof in some circumstances may constitute more than one establishment for purposes of exemptions. In order to effect such a result physical separation is a prerequisite. In addition, the physically separated portions of the business also must be engaged in operations which are functionally separated from each other. Since there is no such functional separation between activities of selling goods or services at retail, the Act recognizes that food service activities of such retail or service establishments as drugstores, department stores, and bowling alleys are not performed by a separate establishment which "is" a "restaurant" so as to qualify for the overtime exemption provided in section 13(b)(8) and accordingly provides a separate overtime exemption in section 13(b)(18) for employees employed by any "retail or service establishments" in such activities in order to equalize the application of the Act between restaurant establishments and retail or service establishments of other kinds which frequently compete with them for customers and labor. (See Sen. Rept. 1487, 89th Cong. first session, p. 32.) For retailing and other functionally unrelated activities performed on the same premises to be considered as performed in separate establishments, a distinct physical place of business engaged in each category of activities must be identifiable. The retail portion of the business must be distinct and separate from and unrelated to that portion of the business devoted to other activities. For example, a firm may engage in selling groceries at retail and at the same place of business be engaged in an unrelated activity, such as the incubation of chicks for sale to growers. The retail grocery portion of the business could be considered as a separate establishment for purposes of the exemption, if it is physically segregated from the hatchery and has separate employees and separate records. In other words, the retail portion of an establishment would be considered a separate establishment from the unrelated portion for the purpose of the exemption if (a) it is physically separated from the other activities; and (b) it is functionally operated as a separate unit having separate records, and separate bookkeeping; and (c) there is no interchange of employees between the units. The requirement that there be no interchange of employees between the units does not mean that an employee of one unit may not occasionally, when circumstances require it, render some help in the other units or that one employee of one unit may not be transferred to work in the other unit. The requirement has reference to the indiscriminate use of the employee in both units without regard to the segregated functions of such units.

§ 779.306 Leased departments not separate establishments.

It does not follow from the principles discussed in § 779.305 that leased departments engaged in the retail sale of goods or services in a departmentalized store are separate establishments. To the contrary, it is only in rare instances that such leased departments would be separate establishments for purposes of the exemptions. For example, take a situation where the departmentalized retail store, having leased departments, controls the space location, determines the type of goods that may be sold, determines the pricing policy, bills the customers passes on customers' credit, receives payments due, handles complaints, determines the personnel policies, and performs other functions as well. In such situations the leased department is an integral part of the retail store and considered to be such by the customers. It is clear that such departments are not separate establishments but rather a part of the retail store establishment and will be considered as such for purposes of the exemptions. The same result may follow in the case of leased departments engaged in the retail sale of goods or services in a departmentalized store where all or most of the departments are leased or otherwise individually owned, but which operate under one common trade name and hold themselves out to the public as one integrated business unit.

§ 779.307 Meaning and scope of "employed by" and "employee of."

Section 13(a)(2) as originally enacted in 1938 exempted any employee "engaged in" any retail or service establishment. The 1949 amendments to that section, however, as contained in section 13(a) (2) and (4) exempted any employee "employed by" any establishment described in those exemptions. The 1961 and 1966 amendments retained the "employed by" language of these exemptions. Thus, where it is found that any of those exemptions apply to an establishment owned or operated by the employer the employees "employed by" that establishment of the employer are exempt from the minimum wage and overtime provisions of the Act without regard to whether such employees perform their activities inside or outside the establishment. Thus, such employees as collectors, repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers, and delivery men actually employed by an exempt retail or service establishment are exempt from the minimum wage and overtime provisions of the Act although they may perform the work of the establishment away from the premises. As used in section 13 of the Act, the phrases "employee of" and "employed by" are synonymous.

§ 779.308 Employed within scope of exempt business.

In order to meet the requirement of actual employment "by" the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business. (See Davis v. Goodman Lumber Co., 133 F. 2d 52 (CA-4) (holding section 13(a)(2) exemption inapplicable to employees working in manufacturing phase of employer's retail establishment); Wessling v. Carroll Gas Co., 266 F. Supp. 795 (N.D. Iowa); Oliveira v. Basteiro, 18 WH Cases 668 (S.D. Texas). See also, Northwest Airlines v. Jackson, 185 F. 2d 74 (CA-8); Walling v. Connecticut Co., 154 F. 2d 522 (CA-2) certiorari denied, 329 U.S. 667; and Wabash Radio Corp. v. Walling, 162 F. 2d 391 (CA-6).)

§ 779.309 Employed "in" but not "by."

Since the exemptions by their terms apply to the employees "employed by" the exempt establishment, it follows that those exemptions will not extend to other employees who, although actually working in the establishment and even though employed by the same person who is the employer of all under section 3(d) of the Act, are not "employed by" the exempt establishment. Thus, traveling auditors, manufacturers' demonstrators, display-window arrangers, sales instructors, etc., who are not "employed by" an exempt establishment in which they work will not be exempt merely because they happen to be working in such an exempt establishment, whether or not they work for the same employer. (Mitchell v. Kroger Co., 248 F. 2d 935 (CA-8).) For example, if the manufacturer sends one of his employees to demonstrate to the public in a customer's exempt retail establishment the products which he has manufactured, the employee will not be considered exempt under section 13(a)(2) since he is not employed by the retail establishment but by the manufacturer. The same would be true of an employee of the central offices of a chain-store organization who performs work for the central organization on the premises of an exempt retail outlet of the chain (Mitchell v. Kroger Co., supra.)

§ 779.310 Employees of employers operating multi-unit businesses.

(a) Where the employer's business operations are conducted in more than one establishment, as in the various units of a chain-store system or where branch establishments are operated in conjunction with a main store, the employer is entitled to exemption under section 13(a) (2) or (4) for those of his employees in such business operations, and those only, who are "employed by" an establishment which qualifies for exemption under the statutory tests. For example, the central office or central warehouse of a chain-store operation even though located on the same premises as one of the chain's retail stores would be considered a separate establishment for purposes of the exemption, if it is physically separated from the area in which the retail operations are carried on and has separate employees and records. (Goldberg v. Sunshine Department Stores, 15 W.H. Cases 169 (CA-5) Mitchell v. Miller Drugs, Inc., 255 F. 2d 574 (CA-1); Walling v. Goldblatt Bros., 152 F. 2d 475 (CA-7).)

(b) Under this test, employees in the warehouse and central offices of chainstore systems have not been exempt prior to, and their nonexempt status is not changed by, the 1961 amendments. Typically, chain-store organizations are merchandising institutions of a hybrid retail-wholesale nature, whose wholesale functions are performed through their warehouses and central offices and similar establishments which distribute to or serve the various retail outlets. Such central establishments clearly cannot qualify as exempt establishments. (A. H. Phillips, Inc. v. Walling, 324 U.S. 490; Mitchell v. C & P Stores, 286 F. 2d 109 (CA-5).) The employees working there are not "employed by" any single exempt establishment of the business; they are, rather, "employed by" an organization of a number of such establishments. Their status obviously differs from that of employees of an exempt retail or service establishment, working in a warehouse operated by and servicing such establishment exclusively, who are exempt as employees "employed by" the exempt establishment regardless of whether or not the warehouse operation is conducted in the same building as the selling or servicing activities.

§ 779.311 Employees working in more than one establishment of same employer.

(a) An employee who is employed by an establishment which qualifies as an exempt establishment under section 13(a) (2) or (4) is exempt from the minimum wage and overtime requirements of the Act even though his employer also operates one or more establishments which are not exempt. On the other hand, it may be stated as a general rule that if such an employer employs an employee in the work of both exempt and nonexempt establishments during the same workweek, the employee is not "employed by" an exempt establishment during such workweek. It is recognized, however, that employees performing an insignificant amount of such incidental work or performing work sporadically for the benefit of another establishment of their employer nevertheless, are "employed by" their employer's retail establishment. For example, there are situations where an employee of an employer in order to discharge adequately the requirements of his job for the exempt establishment by which he is employed incidentally or sporadically may be called upon to perform some work for the benefit of another establishment. For example, an elevator operator employed by a retail store, in performance of his regular duties for the store incidentally may carry personnel who have a central office or warehouse function. Similarly, a maintenance man employed by such store incidentally may perform work which is for the benefit of the central office or warehouse activities. Also, a sales clerk employed in a retail store in one of its sales departments sporadically may be called upon to release some of the stock on hand in the department for the use of another store.

(b) The application of the principles discussed in § 779.310 and in paragraph (a) of this section would not preclude the applicability of the exemption to the employee whose duties require him to spend part of his week in one exempt retail establishment and the balance of the week in another of his employer's exempt retail establishments; provided that his work in each of the establishments will qualify him as "employed" by such a retail establishment at all times within the individual week. As an example, a shoe clerk may sell shoes for part of a week in one exempt retail establishment of his employer and in another of his employer's exempt retail establishments for the remainder of the workweek. In that entire workweek he would be considered to be employed by an exempt retail establishment. In such a situation there is no central office or warehouse concept, nor is the employee considered as performing services for the employer's business organization as a whole since there is no period during the week in which the employee is not "employed by" a single exempt retail establishment.

STATUTORY MEANING OF RETAIL OR SERVICE ESTABLISHMENT

§ 779.312 "Retail or service establishment", defined in section 13(a)(2).

The 1949 amendments to the Act defined the term "retail or service establishment" in section 13(a)(2). That definition was retained in section 13(a)(2) as amended in 1961 and 1966 and is as follows:

> A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

It is clear from the legislative history of the 1961 amendments to the Act that no different meaning was intended by the term "retail or service establishment" from that already established by the Act's definition, wherever used in the new provisions, whether relating to coverage or to exemption. (See S. Rept. 145, 87th Cong., first session p. 27; H.R. 75, 87th Cong., first session p. 9.) The legislative history of the 1949 amendments and existing judicial pronouncements regarding section 13(a)(2) of the Act, therefore, will offer guidance to the application of this definition.

§ 779.313 Requirements summarized.

The statutory definition of the term "retail or service establishment" found in section 13(a)(2), clearly provides that an establishment to be a "retail or service establishment": (a) Must engage in the making of sales of goods or services; and (b) 75 percent of its sales of goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale. These requirements are discussed below in §§ 779.314 through 779.341.

MAKING SALES OF GOODS AND SERVICES "RECOGNIZED AS RETAIL"

§ 779.314 "Goods" and "services" defined.

The term "goods" is defined in section 3(i) of the Act and has been discussed above in § 779.14. The Act, however, does not define the term "services." The term "services," therefore, must be given a meaning consistent with its usage in ordinary speech, with the context in which it appears and with the legislative history of the exemption as it explains the scope, the purposes and the objectives of the exemption. Although in a very general sense every business might be said to perform a service it is clear from the context and the legislative history that all business establishments are not making sales of "services" of the type contemplated in the Act; that is, services rendered by establishments which are traditionally regarded as local retail service establishments such as the restaurants, hotels, barber shops, repair shops, etc. (See §§ 779.315 through 779.320.) It is to these latter services only that the term "service" refers.

§ 779.315 Traditional local retail or service establishments.

The term "retail" whether it refers to establishments or to the sale of goods or services is susceptible of various interpretations. When used in a specific law it can be defined properly only in terms of the purposes and objectives and scope of that law. In enacting the section 13(a)(2) exemption, Congress had before it the specific object of exempting from the minimum wage and overtime requirements of the Act employees employed by the traditional local retail or service establishment, subject to the conditions specified in the exemption. (See statements of Rep. Lucas, 95 Cong. Rec. pp. 11004 and 11116, and of Sen. Holland, 95 Cong. Rec. pp. 12502 and 12506.) Thus, the term "retail or service establishment" as used in the Act denotes the traditional local retail or service establishment whether pertaining to the coverage or exemption provisions.

§ 779.316 Establishments outside "retail concept" not within statutory definition; lack first requirement.

The term "retail" is alien to some businesses or operations. For example, transactions of an insurance company are not ordinarily thought of as retail transactions. The same is true of an electric power company selling electrical energy to private consumers. As to establishments of such businesses, therefore, a concept of retail selling or servicing does not exist. That it was the intent of Congress to exclude such businesses from the term "retail or service establishment" is clearly demonstrated by the legislative history of the 1949 amendments and by the judicial construction given said term both before and after the 1949 amendments. It also should be noted from the judicial pronouncements that a "retail concept" cannot be artificially created in an industry in which there is no traditional concept of retail selling or servicing. (95 Cong. Rec. pp. 1115, 1116, 12502, 12506, 21510, 14877, and 14889; Mitchell v. Kentucky Finance Co., 359 U.S. 290; Phillips Co. v. Walling, 324 U.S. 490; Kirschbaum Co. v. Walling, 316 U.S. 517; Durkin v. Joyce Agency, Inc., 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom Mitchell v. Joyce Agency, Inc., 348 U.S. 945; Goldberg v. Roberts 291 F. 2d 532 (CA-9); Wirtz v. Idaho Sheet Metal Works, 335 F. 2d 952 (CA-9), affirmed in 383 U.S. 190; Telephone Answering Service v. Goldberg, 290 F. 2d 529 (CA-1).) It is plain, therefore, that the term "retail or service establishment" as used in the Act does not encompass establishments in industries lacking a "retail concept". Such establishments not having been traditionally regarded as retail or service establishments cannot under any circumstances qualify as a "retail or service establishment" within the statutory definition of the Act, since they fail to meet the first requirement of the statutory definition. Industry usage of the term "retail" is not in itself controlling in determining when business transactions are retail sales under the Act. Judicial authority is quite clear that there are certain goods and services which can never be sold at retail. (Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; Wirtz v. Steepleton General Tire Company, Inc., 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

§ 779.317 Partial list of establishments lacking "retail concept."

There are types of establishments in industries where it is not readily apparent whether a retail concept exists and whether or not the exemption can apply. It, therefore, is not possible to give a complete list of the types of establishments that have no retail concept. It is possible, however, to give a partial list of establishments to which the retail concept does not apply. This list is as follows:

Accounting firms.
Adjustment and credit bureaus and collection agencies (Mitchell v. Rogers d.b.a. Commercial Credit Bureau, 138 F. Supp. 214 (D. Hawaii); Mill v. United States Credit Bureau, 1 WH Cases 878, 5 Labor Cases par. 60,992 (S.D.Calif.).
Advertising agencies including billboard advertising.
Air-conditioning and heating systems contractors.
Aircraft and aeronautical equipment; establishments engaged in the business of dealing in.
Airplane crop dusting, spraying and seeding firms.
Airports, airport servicing firms and fixed base operators.
Ambulance service companies.
Apartment houses.
Armored car companies.
Art; commercial art firms.
Auction houses (Fleming v. Kenton Whse., 41 F. Supp. 255).
Auto-wreckers' and junk dealers' establishments (Bracy v. Luray, 138 F. 2d 8 (CA-4); Edwards v. South Side Auto Parts (Mo. App.) 180 SW 2d 1015. (These typically sell for resale.)
Automatic vending machinery; establishments engaged in the business of dealing in.
Banks (both commercial and savings).
Barber and beauty parlor equipment; establishments engaged in the business of dealing in.
Blacksmiths; industrial.
Blue printing and photostating establishments.
Booking agencies for actors and concert artists.
Bottling and bottling equipment and canning machinery; establishments engaged in the business of dealing in.

Broadcasting companies.
Brokers, custom house; freight brokers; insurance brokers, stock or commodity brokers.
Building and loan associations.
Building contractors.
Burglar alarms; establishments engaged in furnishing, installing and repairing for commercial establishments (Walling v. Thompson, 65 F. Supp. 686 (S.D. Calif.)).
Burial associations (Gilreath v. Daniel (C.A. 8), 19 WH Cases 370).
Butchers' equipment; establishments engaged in the business of dealing in.
Chambers of Commerce.
Chemical equipment; establishments engaged in the business of dealing in.
Clubs and fraternal organizations with a select or restricted membership.
Common and contract carriers; establishments engaged in providing services, fuel, equipment, or other goods or facilities for the operation of such carriers (Idaho Sheet Metal Works v. Wirtz, 383 U.S. 190, rehearing denied 383 U.S. 963; Wirtz v. Steepleton General Tire Co., Inc. 383 U.S. 190, rehearing denied 383 U.S. 963; Boutell v. Whaling).
Common carrier stations and terminals.
Construction contractors.
Contract Post Offices.
Credit companies, including small loan and personal loan companies (Mitchell v. Kentucky Finance Co., 359 U.S. 290).
Credit rating agencies.
Dentists' offices.
Dentists supply and equipment establishments.
Detective agencies.
Doctors' offices.
Dry cleaners (see 95 Cong. Rec., p. 12503 and § 779.337 (b) of this part).
Drydock companies.
Drydock
Dye houses, commercial (Walling v. Kerr, 47 F. Supp. 852 (E.D. Pa)).
Duplicating, addressing, mailing, mail listings, and letter stuffing establishments (Goldberg v. Roberts d.b.a. Typing and Mailing Unlimited, 15 WH Cases 100, 42 L.C. par. 31,126 (CA-9; Durkin v. Shone, 112 F. Supp. 375 (E.D. Tenn.); Hanzley v. Hooven Letters, 44 N.Y.S. 2d 398 (City Ct. N.Y. 1943).
Educational institutions (for express exclusion see § 779.337(b)).
Electric and gas utilities (Meeker Cooperative Light & Power Assn. v. Phillips, 158 F. 2d 698 (CA-8); New Mexico Public Service Co. v. Engel, 145 F. 2d 636 (CA-10); Brown v. Minngas Co., 51 F. Supp. 363 (D. Minn.)).
Electric signs; establishments engaged in making, installing and servicing.
Elevators; establishments engaged in repairing (Cf. Muldowney v. Seaberg Elevator Co., 39 F. Supp. 275 (E.D.N.Y.)).
Employment Agencies (Yunker v. Abbye Employment Agency, Inc., 32 N.Y.S. 2d 715 (N.Y.C. Munic. Ct. 1942)).
Engineering firms.
Factors.
Filling station equipment; establishments engaged in the business of dealing in.
Finance companies (Mitchell v. Kentucky Finance Co., 359 U.S. 290).
Flying schools.
Gambling establishments.
Geological surveys; firms engaged in making.
Heating and air conditioning systems contractors.
Hospital equipment (such as operating instruments, X-ray machines, operating tables, etc.); establishments engaged in the business of dealing in.
Insurance; mutual, stock and fraternal benefit, including insurance brokers, agents, and claims adjustment offices.
Income tax return preparers.
Investment counseling firms.
Jewelers' equipment; establishments engaged in the business of dealing in.
Job efficiency checking and rating; establishments engaged in the business of supplying.
Labor unions.
Laboratory equipment; establishments engaged in the business of dealing in.
Landscaping contractors.
Laundries (see 95 Cong. Rec. p. 12503 and § 779.337 (b) of this Part).
Laundry; establishments engaged in the business of dealing in commercial laundry equipment.
Lawyers' offices.
Legal concerns engaged in compiling and distributing information regarding legal developments.
License and legal document service firms.
Loan offices (see credit companies).
Loft buildings or office buildings, concerns engaged in renting and maintenance of (Kirschbaum v. Walling, 316 U.S. 517; Statement of Senator Holland, 95 Cong. Rec., p. 12505).
Machinery and equipment, including tools—establishments engaged in selling or servicing of construction, mining, manufacturing and industrial machinery, equipment and tools (Roland Electric Co. v. Walling, 326 U.S. 657; Guess v. Montaque, 140 F. 2d 500 (CA-4); cf. Walling v. Thompson, 65 F. Supp. 686 (S.D. Calif.)).
Magazine subscription agencies (Wirtz v. Keystone Serv. (C.A. 5), 418 F. 2d 249).
Medical and dental clinics.
Medical and dental laboratories.
Medical and dental laboratory supplies; establishments engaged in the business of dealing in.
Messenger; firms engaged in furnishing commercial messenger service (Walling v.

BEST DOCUMENT AVAILABLE

Allied Messenger Service, 47 F. Supp. 773 (S.D.N.Y.)).

Newspaper and magazine publishers.

Oil well drilling; companies engaged in contract oil well drilling.

Oil well surveying firms (Straughn v. Schlumberger Well Surveying Corp., 72 F. Supp. 511 (S.D. Tex.)).

Packing companies engaged in slaughtering livestock (Walling v. Peoples Packing Co., 132 F. 2d 236 (CA-10)).

Painting contractors.

Pharmacists' supplies; establishments engaged in the business of dealing in.

Photography, commercial, establishments engaged in.

Plumbers' equipment; establishments engaged in the business of dealing in.

Plumbing contractors.

Press clipping bureaus.

Printers' and lithographers' supplies; establishments engaged in the business of dealing in.

Printing and binding establishments (Casa Baldridge, Inc. v. Mitchell, 214 F. 2d 703 (CA-1)).

Protection and Shopping services for industry; establishments engaged in supplying (Durkin v. Joyce Agency, Inc., 110 F. Supp. 918 (N.D. Ill.) affirmed sub nom. Mitchell v. Joyce Agency, Inc., 348 U.S. 945).

Quarris (Walling v. Partee, 3 WH Cases 543, 7 Labor Cases, par. 61,721 (M.D. Tenn.)).

Radio and television broadcasting stations and studios.

Ready-mix concrete suppliers.

Real estate companies.

Roofing contractors.

Schools (except schools for mentally or physically handicapped or gifted children): (All now excluded, see § 779.337(b)).

School supply distributors.

Security dealers.

Sheet metal contractors.

Ship equipment, commercial; establishments engaged in the business of dealing in.

Shopping analysts services.

Siding and insulation contractors.

Sign-painting shops.

Special trade contractors (construction industry).

Stamp and coupon redemption stores.

Statistical reporting, business and financial data; establishments engaged in furnishing.

Store equipment; establishments engaged in the business of dealing in.

Tax services.

Telegraph and cable companies.

Telephone companies; (Schmidt v. Peoples Telephone Union of Maryville, Mo., 138 F. 2d 13 (CA-8)).

Telephone answer service; establishments engaged in furnishing. (Telephone Answering Service v. Goldberg, 15 WH Cases 67, 4 L.C. par. 31,104 (CA-1)).

Title and abstract companies.

Tobacco auction warehouses (Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., 41 F. Supp. 255 (E.D. Ky.); Walling v. Lincoln Loose Leaf Warehouse Co., 59 F. Supp. 601 (E.D. Tenn.)).

Toll bridge companies.

Trade associations.

Transportation equipment, commercial; establishments engaged in the business of dealing in.

Transportation companies.

Travel agencies.

Tree removal firms.

Truck stop establishments (Idaho Sheet Metal Works, Inc., v. Wirtz, 383 U.S. 190, rehearing denied 383 U.S. 963; Wirtz v. Steepleton General Tire Co., Inc., 383 U.S. 190, rehearing denied 383 U.S. 963).

Trust companies.

Undertakers' supplies; establishments engaged in the business of dealing in.

Wagers, establishments accepting, as business in which they are engaged.

Warehouse companies; commercial or industrial (Walling v. Public Quick Freezing and Cold Storage Co., 62 F. Supp. 924 (S.D. Fla.)).

Warehouses equipment and supplies; establishments engaged in the business of dealing in.

Waste removal contractors.

Watchmen, guards and detectives for industries; establishments engaged in supplying (Walling v. Sondock, 132 F. 2d 77 (CA-5); Walling v. Wattam, 3 WH Cases 726, 8 Labor Cases, par. 62,023 (W.D. Tenn., 1943); Walling v. Lum, 4 WH Cases 465, 8 Labor Cases, par. 62,185 (S.D. Miss., 1944); Walling v. New Orleans Private Patrol Service 57 F. Supp. 143 (E.D. La., 1944); Haley v. Central Watch Service, 4 WH Cases 158, 8 Labor Cases, par. 62,002 (N.D. Ill., 1944)).

Water supply companies (Reynolds v. Salt River Valley Water Users Assn., 143 F. 2d (863 (CA-9).)

Water well drilling contractors.

Window displays; establishments engaged in the business of dealing in.

Wrecking contractors.

§ 779.318 Characteristics and examples of retail or service establishments.

(a) Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization of the Nation which is at the very end of

BEST DOCUMENT AVAILABLE

the stream of distribution, disposing in small quantities of the products and skills of such organization and does not take part in the manufacturing process. (See, however, the discussion of section 13(a)(4) in §§ 779.346 to 779.350.) Such an establishment sells to the general public its food and drink. It sells to such public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary. It provides the general public its repair services and other services for the comfort and convenience of such public in the course of its daily living. Illustrative of such establishments are: Grocery stores, hardware stores, clothing stores, coal dealers, furniture stores, restaurants, hotels, watch repair establishments, barber shops, and other such local establishments.

(b) The legislative history of the section 13(a)(2) exemption for certain retail or service establishments shows that Congress also intended that the retail exemption extend in some measure beyond consumer goods and services to embrace certain products almost never purchased for family or noncommercial use. A precise line between such articles and those which can never be sold at retail cannot be drawn. But a few characteristics of items like small trucks and farm implements may offer some guidance; their use is very widespread as is that of consumer goods; they are often distributed in stores or showrooms by means not dissimilar to those used for consumer goods; and they are frequently used in commercial activities of limited scope. The list of strictly commercial items whose sale can be deemed retail is very small and a determination as to the application of the retail exemption in specific cases would depend upon the consideration of all the circumstances relevant to the situation. (Idaho Sheet Metal Works, Inc. v. Wirtz and Wirtz v. Steepleton General Tire Company, Inc., 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

[35 FR 5856, Apr. 9, 1970, as amended at 36 FR 14466, Aug. 6, 1971]

§ 779.319 A retail or service establishment must be open to general public.

The location of the retail or service establishment, whether in an industrial plant, an office building, a railroad depot, or a government park, etc., will make no difference in the application of the exemption and such an establishment will be exempt if it meets the tests of the exemption. Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public. An establishment, however, does not have to be actually frequented by the general public in the sense that the public must actually visit it and make purchases of goods or services on the premises in order to be considered as available and open to the general public. A refrigerator repair service shop, for example, is available and open to the general public even if it receives all its orders on the telephone and performs all of its repair services on the premises of its customers.

§ 779.320 Partial list of establishments whose sales or service may be recognized as retail.

Antique shops.
Auto courts.
Automobile dealers' establishments.
Automobile laundries.
Automobile repair shops.
Barber shops.
Beauty shops.
Bicycle shops.
Billiard parlors.
Book stores.
Bowling alleys.
Butcher shops.
Cafeterias.
Cemeteries.
China, glassware stores.
Cigar stores.
Clothing stores.
Coal yards.
Confectionery stores.
Crematories.
Dance halls.
Delicatessen stores.
Department stores.
Drapery stores.
Dress-suit rental establishments.
Drug stores.
Dry goods stores.
Embalming establishments.

BEST DOCUMENT AVAILABLE

Farm implement dealers.
Filling stations.
Floor covering stores.
Florists.
Funeral homes.
Fur repair and storage shops.
Fur shops.
Furniture stores.
Gift, novelty and souvenir shops.
Grocery stores.
Hardware stores.
Hosiery shops.
Hotels.
Household appliance stores.
Household furniture storage and moving establishments.
Household refrigerator service and repair shops.
Infants' wear shops.
Jewelry stores.
Liquor stores.
Luggage stores.
Lumber yards.
Masseur establishments.
Millinery shops.
Musical instrument stores and repair shops.
Newsstands.
Paint stores.
Public parking lots.
Photographic supply and camera shops.
Piano tuning establishments.
Public baths.
Public garages.
Recreational camps.
Reducing establishments.
Restaurants.
Roadside diners.
Scalp-treatment establishments.
Shoe repair shops.
Shoeshine parlors.
Sporting goods stores.
Stationery stores.
Taxidermists.
Theatres.
Tourist homes.
Trailer camps.
Undertakers.
Variety shops.
Watch, clock and jewelry repair establishments.

[36 FR 14466, Aug. 6, 1971]

§ 779.321 Inapplicability of "retail concept" to some types of sales or services of an eligible establishment.

(a) Only those sales or services to which the retail concept applies may be recognized as retail sales of goods or services for purposes of the exemption. The fact that the particular establishment may have a concept of retailability, in that it makes sales of types which may be recognized as retail, is not determinative unless the requisite portion of its annual dollar volume is derived from particular sales of its goods and services which have a concept of retailability. Thus, the mere fact that an establishment is of a type noted in § 779.320 does not mean that any particular sales of such establishment are within the retail concept. As to each particular sale of goods or services, an initial question that must be answered is whether the sales of goods or services of the particular type involved can ever be recognized as retail. The Supreme Court in Wirtz v. Steepleton General Tire Co., 383 U.S. 190, confirmed the Department's position that (1) the concept of "retailability" must apply to particular sales of the establishment, as well as the establishment or business as a whole, and (2) even as to the establishment whose sales are "variegated" and include retail sales, that nonetheless classification of particular sales of goods or services as ever coming within the concept of retailability must be made. Sales of some particular types of goods or services may be decisively classified as nonretail on the ground that such particular types of goods or services cannot ever qualify as retail whatever the terms of sale, regardless of the industry usage or classification.

(b) An establishment is, therefore, not automatically exempt upon a finding that it is of the type to which the retail concept of selling or servicing is applicable; it must meet all the tests specified in the Act in order to qualify for exemption. Thus, for example, an establishment may be engaged in repairing household refrigerators, and in addition it may be selling and repairing manufacturing machinery for manufacturing establishments. The retail concept does not apply to the latter activities. In such case, the exemption will not apply if the annual dollar volume derived from the selling and servicing of such machinery, and from any other sales and services which are not recognized as retail sales or services, and from sales of goods or services for resale exceeds 25 percent of the establishment's total annual dollar volume of sales of goods or services.

(c) Since there is no retail concept in the construction industry, gross receipts from construction activities of any establishment also engaged in retail selling must be counted as dollar volume from sales not recognized as retail in applying the percentage tests of section 13(a)(2). Also, since construction and the distribution of goods are entirely dissimilar activities performed in industries traditionally recognized as wholly separate and distinct from each other, an employee engaged in construction activities is not employed within the scope of his employer's otherwise exempt retail business in any week in which the employee engages in such construction work, and is therefore (see § 779.308) not employed "by" a retail or service establishment within the meaning of the Act in such workweek.

(d) Certain business establishments engage in the retail sale to the general public, as goods delivered to purchasers at a stipulated price, of items such as certain plumbing and heating equipment, electrical fixtures and supplies, and fencing and siding for residential installation. In addition to selling the goods they may also install, at an additional charge, the goods which are sold. Installation which is incidental to a retail sale (as distinguished from a construction or reconstruction contract to do a building alteration, or repair job at a contract price for materials and labor required, see § 779.355(a)(1) is considered an exempt activity. By way of example, if the installation for the customer of such goods sold to him at retail requires only minor carpentry, plumbing or electrical work (as may be the case where ordinary plumbing fixtures, or household items such as stoves, garbage disposals, attic fans, or window air conditioners are being installed or replaced), or where only labor of the type required for the usual installation of chain link fences around a home or small business establishment is involved, will normally be considered as incidental to the retail sale of the goods involved (unless, of course, the transaction between the parties is for a construction job at an overall price for the job, involving no retail sale of goods as such). In determining whether such an installation is incidental to a retail sale or constitutes a nonretail construction activity, it is necessary to consider the general characteristics of the entire transaction. Where one or more of the following conditions are present, the installation will normally be considered a construction activity rather than incidental to a retail sale:

(1) The cost to the purchaser of the installation in relation to the sale price of the goods is substantial;

(2) The installation involves substantial structural changes, extensive labor, planning or the use of specialized equipment;

(3) The goods are being installed in conjunction with the construction of a new home or other structure; or

(4) The goods installed are of a specialized type which the general consuming public does not ordinarily have occasion to use.

(e) An auxiliary employee of an exempt retail or service establishment performing clerical, maintenance, or custodial work in the exempt establishment which is related to the establishment's construction activities will, for enforcement purposes, be considered exempt in any workweek if no more than 20 percent of his time is spent in such work.

"RECOGNIZED" AS RETAIL "IN THE PARTICULAR INDUSTRY"

§ 779.322 Second requirement for qualifying as a "retail or service establishment."

If the business is one to which the retail concept is applicable then the second requirement for qualifying as a "retail or service establishment" within that term's statutory definition is that 75 percent of the establishment's annual dollar volume must be derived from sales of goods or services (or of both) which are recognized as retail sales or services in the particular industry. Under the Act, this requirement is distinct from the requirement that 75 percent of annual dollar volume be from sales of goods or services "not for resale" (§ 779.329); many sales which are not for resale lack a retail concept and the fact that a sale is not for resale cannot establish that it is recognized as retail in a particular industry. (See Wirtz v. Steepleton

General Tire Co., 383 U.S. 190.) To determine whether the sales or services of an establishment are recognized as retail sales or services in the particular industry, we must inquire into what is meant by the terms "recognized" and "in the particular industry," and into the functions of the Secretary and the courts in determining whether the sales are recognized as retail in the industry.

§ 779.323 Particular industry.

In order to determine whether a sale or service is recognized as a retail sale or service in the "particular industry" it is necessary to identify the "particular" industry to which the sale or service belongs. Some situations are clear and present no difficulty. The sale of clothes, for example, belongs to the clothing industry and the sale of ice belongs to the ice industry. In other situations, a sale or service is not so easily earmarked and a wide area of overlapping exists. Household appliances are sold by public utilities as well as by department stores and by stores specializing in the sale of such goods; and tires are sold by manufacturers' outlets, by independent tire dealers and by other types of outlets. In these cases, a fair determination as to whether a sale or service is recognized as retail in the "particular" industry may be made by giving to the term "industry" its broad statutory definition as a "group of industries" and thus including all industries wherein a significant quantity of the particular product or service is sold. For example, in determining whether a sale of lumber is a retail sale, it is the recognition the sale of lumber occupies in the lumber industry generally which decides its character rather than the recognition such sales occupies in any branch of that industry.

§ 779.324 Recognition "in."

The express terms of the statutory provision requires the "recognition" to be "in" the industry and not "by" the industry. Thus, the basis for the determination as to what is recognized as retail "in the particular industry" is wider and greater than the views of an employer in a trade or business, or an association of such employers. It is clear from the legislative history and judicial pronouncements that it was not the intent of this provision to delegate to employers in any particular industry the power to exempt themselves from the requirements of the Act. It was emphasized in the debates in Congress that while the views of an industry are significant and material in determining what is recognized as a retail sale in a particular industry, the determination is not dependent on those views alone. (See 95 Cong. Rec. pp. 12501, 12502, and 12510; Wirtz v. Steepleton General Tire Co., 383 U.S. 190; Mitchell v. City Ice Co., 273 F. 2d 560 (CA-5); Durkin v. Casa Baldrich, Inc., 111 F. Supp. 71 (DCPR) affirmed 214 F. 2d 703 (CA-1); see also Aetna Finance Co. v. Mitchell, 247 F. 2d 190 (CA-1).) Such a determination must take into consideration the well-settled habits of business, traditional understanding and common knowledge. These involve the understanding and knowledge of the purchaser as well as the seller, the wholesaler as well as the retailer, the employee as well as the employer, and private and governmental research and statistical organizations. The understanding of all these and others who have knowledge of recognized classifications in an industry, would all be relevant in the determination of the question.

§ 779.325 Functions of the Secretary and the courts.

It may be necessary for the Secretary in the performance of his duties under the Act, to determine in some instances whether a sale or service is recognized as a retail sale or particular industry. In the exceptional case where the determination cannot be made on the basis of common knowledge or readily accessible information, the Secretary may gather the information needed for the purpose of making such determinations. Available information on usage and practice in the industry is carefully considered in making such determinations, but the "word-usage of the industry" does not have controlling force; the Secretary "cannot be hamstrung by the terminology of a particular trade" and possesses considerable discretion as the one responsible for the actual administration of the Act. (Wirtz v. Steepleton General Tire Co., 383 U.S. 190; and see 95 Cong. Rec. 12501-12502, 12510.) The responsibility for making final decisions, of course, rests with the courts. An employer disagreeing with the determinations of the Secretary and claiming exemption has the burden of proving in a court proceeding that the prescribed percentage of the establishment's sales or services are recognized as retail in the industry and that his establishment qualifies for the exemption claimed by him. (See Wirtz v. Steepleton, cited above, and 95 Cong. Rec. 12510.)

§ 779.326 Sources of information.

In determining whether a sale or service is recognized as a retail sale or service in a particular industry, there are available to the Secretary a number of sources of information to aid him in arriving at a conclusion. These sources include: (a) the legislative history of the Act as originally enacted in 1938 and the legislative history of the 1949, 1961, and 1966 amendments to the Act pertaining to those sections in which the term "retail or service establishment" is found, particularly in the section 13(a)(2) exemption; (b) the decisions of the courts during the intervening years; and (c) the Secretary's experience in the intervening years in interpreting and administering the Act. These sources of information enable the Secretary to lay down certain standards and criteria, as discussed in this subpart, for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries.

§ 779.327 Wholesale sales.

A wholesale sale, of course, is not recognized as a retail sale. If an establishment derives more than 25 percent of its annual dollar volume from sales made at wholesale, it clearly cannot qualify as a retail and service establishment. It must be remembered, however, that what is a retail sale for purposes of a sales tax law is not necessarily a retail sale for purposes of the statutory definition of the term "retail or service establishment". Similarly, a showing that sales of goods or services are not wholesale or are made to the ultimate consumer and are not for resale does not necessarily prove that such sales or services are recognized in the particular industry as retail. (Wirtz v. Steepleton General Tire Co., 388 U.S. 190.)

§ 779.328 Retail and wholesale distinguished.

(a) The distinction between a retail sale and a wholesale sale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods or services. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail. What constitutes a small quantity of goods depends, of course, upon the facts in the particular case and the quantity will vary with different commodities and in different trades and industries. Thus, a different quantity would be characteristic of retail sales of canned tomato juice, bed sheets, furniture, coal, etc. The quantity test is a well-recognized business concept. There are reasonably definite limits as to the quantity of a particular commodity which the general consuming public regularly purchases at any given time at retail and businessmen are aware of these buying habits. These buying habits set the standard for the quantity of goods which is recognized in an industry as the subject of a retail sale. Quantities which are materially in excess of such a standard are generally regarded as wholesale and not retail quantities.

(b) The sale of goods or services in a quantity approximating the quantity involved in a normal wholesale transaction and as to which a special discount from the normal retail price is given is generally regarded as a wholesale sale in most industries. Whether the sale of such a quantity must always involve a discount in order to be considered a wholesale sale depends upon industry practice. If the practice in a particular industry is such that a discount from the normal retail price is not regarded in the industry as significant in determining whether the sale of a certain quantity is a wholesale sale, then the question of whether the sale of such a quantity will be considered a wholesale sale would be determined without reference to the price. In some industries, the sale of a small quantity at a discount may also be regarded as a wholesale sale, in which case it will be so treated for purposes of the exemption. Generally, as the Supreme Court has recognized (Wirtz v. Steepleton General Tire Co., 383 U.S. 1900), both the legislative history and common parlance suggest that "the term retail becomes less apt as the quantity and the price discount increases in a particular transaction."

(c) In some cases, a purchaser contracts for the purchase of a large quantity of goods or services to be delivered or performed in smaller quantities or jobs from time to time as the occasion requires. In other cases, the purchaser instead of entering into a single contract for the entire amount of goods, or services, receives a series of regular deliveries of performances pursuant to a quotation, bid, estimate, or general business arrangement or understanding. In these situations, if the total quantity of goods or services which is sold is materially in excess of the total quantity of goods or services which might reasonably be purchased by a member of the general consuming public during the same period, it will be treated as a wholesale quantity for purposes of the statutory definition of the term "retail or service establishment", in the absence of clear evidence that under such circumstances such a quantity is recognized as a retail quantity in the particular industry. For example, if a food service firm contracts with a college to provide meals for the latter's boarding students for a term, in consideration of payment by the college of a stipulated sum based on the number of students registered or provided with meals, the services are being sold in a wholesale, rather than a retail quantity. If such a contract is entered into as a result of formal bids, as noted in paragraph (d) of this section, this would be an additional reason for nonrecognition of the transaction as a retail sale of such services.

(d) Sales made pursuant to formal bid procedures, such as those utilized by the agencies of Federal, State, and local governments and oftentimes by commercial and industrial concerns involving the issuance by the buyer of a formal invitation to bid on certain merchandise or services for delivery in accordance with prescribed terms and specifications, are not recognized as retail sales.

§ 779.329 Effect of type of customer and type of goods or services.

In some industries the type of goods or services sold or the type of purchaser of goods or services are determining factors in whether a sale or service is recognized as retail in the particular industry. In other industries a sale or service may be recognized as retail regardless of the type of goods or services sold or the type of customer. Where a sale is recognized as retail regardless of the type of customer, its character as such will not be affected by the character of the customer, with reference to whether he is a private individual or a business concern, or by the use the purchaser makes of the purchased commodity. For example, if the sale of a single automobile to anyone for any purpose is recognized as a retail sale in the industry, it will be considered as a retail sale for purposes of the exemption whether the customer be a private individual or an industrial concern or whether the automobile is used by the purchaser for pleasure purposes or for business purposes. If a sale of a particular quantity of coal is recognized in the industry as a retail sale, its character as such will not be affected by the fact that it is sold for the purpose of heating an office building as distinguished from a private dwelling. If the repair of a wash basin is recognized in the industry as a retail service, its character as such will not be affected by the fact that it is a wash basin in a factory building as distinguished from a wash basin in a private dwelling house. It must be remembered that these principles apply only to those sales of goods or services which have a retail concept, that is, where the subject matter is "retailable." See § 779.321. The "industry-recognition" question as to whether such sales are recognized as retail in the industry has no relevancy if in fact the goods and services sold are not of a "retailable" character, as previously explained. If the subject of the sale does not come within the concept of retailable items contemplated by the statute, there can be no recognition in any industry of the sale of the goods or services as retail, for purposes of the Act, even though the nomenclature used by the industry members may put a retail label on the transaction. (See Wirtz v. Steepleton General Tire Co., 383 U.S. 190; Mitchell v. Kentucky Finance Co., 359 U.S. 290.)

SALES NOT MADE FOR RESALE

§ 779.330 Third requirement for qualifying as a "retail or service establishment."

The third requirement for qualifying as a "retail or service establishment" within that term's statutory definition is that 75 percent of the retail or service establishment's annual dollar volume must be from sales of goods or of services (or of both) which are not made for resale. At least three-fourths of the total sales of goods or services (or of both) (measured by annual dollar volume) must not be made for resale. Except under the special provision in section 3(n) of the Act, discussed in § 779.335, the requirement that 75 percent of the establishment's dollar volume be from sales of goods or services "not for resale" is a separate test and a sale which "for resale" cannot be counted toward the required 75 percent even if it is recognized as retail in the particular industry. The prescribed 75 percent must be from sales which are both not for resale and recognized as retail.

§ 779.331 Meaning of sales "for resale."

Except with respect to a specific situation regarding certain building materials, the word "resale" is not defined in the Act. The common meaning of "resale" is the act of "selling again." A sale is made for resale where the seller knows or has reasonable cause to believe that the goods or services will be resold, whether in their original form, or in an altered form, or as a part, component or ingredient of another article. Where the goods or services are sold for resale, it does not matter what ultimately happens to such goods or services. Thus, the fact that the goods are consumed by fire or no market is found for them, and are, therefore, never resold does not alter the character of the sale which is made for resale. Similarly, if at the time the sale is made, the seller has no knowledge or reasonable cause to believe that the goods are purchased for the purpose of resale, the fact that the goods later are actually resold is not controlling. In considering whether there is a sale of goods or services and whether such goods or services are sold for resale in any specific situation, the term "sale" includes, as defined in section 3(k) of the Act, "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Thus, under the definition sales by an establishment to a competitor are regarded as sales for resale even though made without profit. (Northwestern-Hanna Fuel Co. v. McComb, 166 F. 2d 932 (CA-8).) Similarly, sales for distribution by the purchaser for business purposes are sales for resale under the "other disposition" language of the definition of "sale" even though distributed at no cost to the ultimate recipient. (See Mitchell v. Duplicate Photo Service, 13 WH Cases 71, 31 L.C. Par. 70,287 (S.D. Cal. 1956) accord, Mitchell v. Sherry Corine Corporation, 264 F. 2d 831 (CA-4) (sale of meals to airlines for distribution to their passengers).) It should be noted, however, that occasional transfer of goods from the stock of one retail or service establishment to relieve a shortage in another such establishment under the same ownership will not be considered as sales for resale.

§ 779.332 Resale of goods in an altered form or as parts or ingredients of other goods or services.

Sale for resale includes the sale of goods which will be resold in their original form, in an altered form, or as a part or ingredient of another article. A sale of goods which the seller knows, or has reasonable cause to believe, will be resold after processing or manufacture is a sale for resale. Thus, sales of parts with the expectation that they will be incorporated in aircraft and that the aircraft will be sold clearly are sales for resale. (Arnold v. Ben Kanowsky, Inc., 361 U.S. 388.) Similarly, the sale of lumber to furniture or box factories, or the sale of textiles to clothing manufacturers, is a sale for resale even though the goods are resold in the form of furniture or clothing. The principle is also illustrated in cases where the article sold becomes a part or an ingredient of another, such as scrap metal in steel, dyes in fabrics, flour in bread and pastries, and salt in food or ice in beverages. (Mitchell v. Douglas Auto Parts Co., 11 WH Cases 807, 25 L.C. Par. 68, 119 (N.D. Ill., 1954).) The fact that goods sold will be resold as a part of a service in which they are used or as a part of a building into which they are incorporated does not negate the character of the sale as one "for resale." (Mitchell v. Furman Beauty Supply, 300 F. 2d 16 (CA-3); Mayol v. Mitchell, 280 F. 2d 477 (CA-1), cert. denied 364 U.S. 902; Goldberg v. Kleban Eng. Corp., 303 F. 2d 855 (CA-5).)

§ 779.333 Goods sold for use as raw materials in other products.

Goods are sold for resale where they are sold for use as a raw material in the production of a specific product to be sold, such as sales of coal for the production of coke, coal gas, or electricity, or sales of liquefied-petroleum-gas for the production of chemicals or synthetic rubber. However, the goods are not considered sold for resale if sold for general industrial or commercial uses, such as coal for use in laundries, bakeries, nurseries, canneries, or for space heating, or ice for use by grocery stores or meat markets in cooling and preserving groceries and meat to be sold. Similarly, ice used for cooling soft drinks while in storage will not be considered sold for resale. On the other hand, ice or ice cubes sold for serving soft drinks or other beverages will be considered as sales for resale.

§ 779.334 Sales of services for resale.

The same principles apply in the case of sales of services for resale. A sale of services where the seller knows or has reasonable cause to believe will be resold is a sale for resale. Where, for example, an establishment reconditions and repairs watches for retail jewelers who resell the services to their own customers, the services constitute a sale for resale. Where a garage repairs automobiles for a secondhand automobile dealer with the knowledge or reasonable cause to believe that the automobile on which the work is performed will be sold, the service performed by the garage is a sale for resale. The services performed by a dental laboratory in the making of artificial teeth for the dentist for the use of his patients is a sale of services (as well as of goods) for resale. The services of a fur repair and storage establishment performed for other establishments who sell these services to their own customers, constitute sales for resale. As in the case of the sale of goods, in certain circumstances, sales of services to a business for a specific use in performing a different service which such business renders to its own customers are in economic effect sales for resale as a part of the service that the purchaser in turn sells to his customers, even though such services are consumed in the process of performance of the latter service. For example, if a storage establishment uses mothproofing services in order to render satisfactory storage services for its customers, the sale of such mothproofing services to that storage establishment will be considered a sale for resale.

§ 779.335 Sales of building materials for residential or farm building construction.

Section 3(n) of the Act, as amended, excludes from the category of sales for resale "the sale of goods to be used in residential or farm building construction, repair or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry." Under this section a sale of building materials to a building contractor or a builder for use in residential or farm building, repair or maintenance is not a sale for resale, provided, the sale is otherwise recognized as a bona fide retail sale in the industry. If the sale is not so recognized it will be considered a sale for resale. Thus, only bona fide retail sales of building materials to a building contractor or a builder for the uses described would be taken out of the category of sales for resale. (Sucrs. De A. Mayol & Co. v. Mitchell, 280 F. 2d 477 (CA-1); Elder v. Phillips & Buttroff Mfg. Co., 23 L.C. Par. 67,524 (Tenn., 1958).) The legislative history of the amendment indicates that it is not the intent of its sponsors to remove from the category of sales for resale such sales, for example, as sales of lumber to a contractor to build a whole residential subdivision. (See 95 Cong. Rec. 12533-12535; Sen. St. ibid; 14877.)

§ 779.336 Sales of building materials for commercial property construction.

Sales of building materials to a contractor or speculative builder for the construction, maintenance or repair of commercial property or any other property not excepted in section 3(n) of the Act, as explained above, will be considered as sales for resale. (See §§ 779.332 and 779.335.) Some employers who are dealers in building materials are also engaged in the business of building contractors or speculative builders. Building materials for the carrying on of the employer's contracting or speculative building business often are supplied by the employer himself from or through his building materials establishment. In the analysis of the sales of the building materials establishment for the purpose of determining the qualification of such establishment as a "retail or service establishment" all transfers of stock made by the employer from or through his building materials establishment to his building business for the construction, maintenance or repair of commercial property or any other property not excepted in section 3 (n) of the Act will be considered as sales made by such establishment for resale.

General Tests of Exemption Under Section 13(a)(2)

§ 779.337 Requirements of exemption summarized.

(a) An establishment which is a "retail or service establishment" within the Act's statutory definition of that term (See discussion in §§ 779.312 to 779.336) must, to qualify as an exempt retail or service establishment under section 13(a)(2) of the Act (See § 779.301), meet both of the following tests:

(1) More than 50 percent of the retail or service establishment's total annual dollar volume of sales must be derived from sales of goods or services (or both) which are made within the State in which the establishment is located; and

(2) Either:

(i) The retail or service establishment must not be in an enterprise of the type described in section 3(s), or

(ii) If the retail or service establishment is in an enterprise of the type described in 3(s), it has an annual volume of sales (exclusive of excise taxes at the retail level which are separately stated) of less than $250,000.

(b) The language of the statute in section 13(a)(2) expressly excludes from the exemption an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4) of the Act. No exemption for these is provided under this section even if the establishment meets the tests set forth in paragraph (a) of this section. (See § 779.338(b).) With respect to laundering and drycleaning establishments, which Congress found to lack a retail concept (See § 779.317) and had provided with a separate exemption in former section 13(a)(3) of the Act, repealed by the 1966 amendments, this exclusion simply clarifies the congressional intent to cover employees in such work under section 3(s)(2) of the present Act and to make sure that no exemption under 13(a)(2) will be construed so as to defeat the purpose of repealing the prior special exemption.

§ 779.338 Effect of 1961 and 1966 amendments.

(a) The 1961 amendments to the Fair Labor Standards Act narrowed the exemption for retail or service establishments by permitting section 13(a)(2) to be applied only to an establishment which was not in a covered enterprise, or (if it was in such an enterprise) which had an annual gross volume of sales of less than $250,000 (exclusive of specified taxes). There were certain exemptions to this general principle. These exceptions were set out in section 13(a)(2) (ii) and (iii). The establishments enumerated therein were exempt whether or not they were in a covered enterprise and regardless of the annual dollar volume of sales. They were: Hotels, motels, restaurants, motion picture theaters, seasonally operated amusement or recreational establishments, hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. These establishments were exempt if they met the basic 50 percent in State sales test and the 75 percent retail sales test of section 13(a)(2). The 1966 amendments to the Act repealed sections 13(a)(2) (ii) and (iii). Now to be exempt under section 13(a)(2) hotels, motels, and restaurants must meet the same tests as other retail or service establishments (see § 779.337). Seasonal amusement or recreational establishments and motion picture theaters now have special exemptions from both the minimum wage and overtime pay provisions of the Act as provided by the 1966 amendments in sections 13(a)(3) and 13(a)(9) respectively.

(b) Certain establishments which were previously exempt under section 13(a)(2) prior to the 1966 amendments have been specifically excluded from this exemption as a result of the amendments, even though they may still qualify as retail or service establishments under the definition of such an establishment in that section. These are hospitals, institutions primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of the institution, and schools for physically or mentally handicapped or gifted children. However, such institutions have been recognized as having a retail concept and where the nature of their operations has not changed and where they otherwise satisfy the Act's definition of a "retail or service establishment", certain food service employees employed by such institutions will be considered to be exempt from the Act's overtime pay provisions under section 13(b)(18), exemptions for their administrative or executive employees will not be defeated by nonexempt work occupying less than 40 percent of the employee's time, and full-time students may be employed in accordance with the special minimum wage provisions of section 14 of the Act and Part 519 of this chapter.

SALES MADE WITHIN THE STATE

§ 779.339 More than 50 percent intrastate sales required.

The first test specified in section 13 (a)(2) is that more than 50 percent of the sales of goods or of services (or of both) of a "retail or service establishment" (Measured by annual dollar volume) must be made "within the State in which the establishment is located". This limitation means that such establishment must be primarily engaged (more than 50 percent) in selling to or serving customers within its State. If the establishment is engaged to the extent of 50 percent or more in selling to or serving customers outside the State of its location, the requirement is not met and the establishment cannot qualify for exemption.

§ 779.340 Out-of-State customers.

Whether the sale or service is made to an out-of-State customer is a question of fact. In order for a customer to be considered an out-of-State customer, some specific relationship between him and the seller has to exist to indicate his out-of-State character. Sales made to the casual cash-and-carry customer of a retail or service establishment, who, for all practical purposes, is indistinguishable from the mass of customers who visit the establishment, are sales made within the State even though the seller knows or has reason to believe, because of his proximity to the State line or because he is frequented by tourists, that some of the customers who visit his establishment reside outside the State. If the customer is of that type, sales made to him are sales made within the State even if the seller knows in the particular instance that the customer resides outside the State. On the other hand, a sale is made to an out-of-State customer and, therefore, is not a sale made "within the State" in which the establishment is located, if delivery of the goods is made outside the State. It should be noted that sales of goods or services that are conditioned upon acceptance or rejection by an out-of-State source are interstates sales and not sales made within the State for purposes of section 13(a)(2). For example, a contract entered into in the State where the customer resides for the delivery of a magazine to the customer's residence, is an interstate sale if the contract must be approved by the out-of-State home office of the company publishing the magazine before it becomes effective.

§ 779.341 Sales "made within the State" and "engagement in commerce" distinguished.

Sales to customers located in the same State as the establishment are sales made "within the State" even though such sales may constitute engagement in interstate commerce as where the sale (a) is made pursuant to prior orders from customers for goods to be obtained from outside the State; (b) contemplates the purchase of goods from outside the State to fill a customer's order; or (c) is made to a customer for use in interstate commerce or in production of goods for such commerce.

COMPUTING ANNUAL DOLLAR VOLUME AND COMBINATION OF EXEMPTIONS

§ 779.342 Methods of computing annual volume of sales.

The tests as to whether an establishment qualifies for exemption under section 13(a)(2) of the Act are specified in terms of the "annual dollar volume of sales" of goods or of services (or both) and percentages thereof. The "annual dollar volume of sales" of an establishment consists of the gross receipts from all sales of the establishment during a 12-month period. The methods of computing it for purposes of determining whether the establishment qualifies under the tests of the exemption are the same as the methods of calculating whether the annual gross volume of sales or business of an enterprise or an establishment meets the statutory dollar tests for coverage. These are discussed in §§ 779.265 to 779.269. However, for purposes of the exemption tests the specified percentages are based on annual dollar volume before deduction of those taxes which are excluded in determining whether the $250,000 test is met. The exemption tests are in terms of the annual dollar volume of the establishment. This will include dollar volume from transactions with other establishments in the same enterprise, even though such transactions within an enterprise may not be part of the annual gross volume of the enterprise's sales made or business done (see § 779.259).

§ 779.343 Combinations of exemptions.

(a) An employee may be engaged in a particular workweek in two or more types of activities for each of which a specific exemption is provided by the Act. The combined work of the employee during such a workweek may not satisfy the requirements of either exemption. It is not the intent of the Act, however, that an exemption based on the performance of one exempt activity should be defeated by the performance of another activity which has been made the basis of an equivalent exemption under another provision of the Act. Thus, where an employee during a particular workweek is exclusively engaged in performing two or more activities to which different exemptions are applicable, each of which activities considered separately would be an exempt activity under the applicable exemption if it were the sole activity of the employee for the whole workweek in question, as a matter of enforcement policy the employee will be considered exempt during such workweek. If the scope of such exemptions is not the same, the exemption applicable to the employee will be equivalent to that provided by whichever exemption provision is more limited in scope.

(b) In the case of an establishment which sells both goods and services at retail and which qualifies as an exempt establishment under section 13(a)(2), but cannot, as a whole, meet the tests of section 13(a)(4) because it sells services as well as goods, a combination of section 13(a)(2) and 13(a)(4) exemptions may nevertheless be available for employees of the establishment who make or process, on the premises, goods which it sells. Such employees employed by an establishment which, as a whole, meets the tests set forth in section 13(a)(2), will be considered exempt under this combination exemption if the establishment, on the basis of all its activities other than sales of services, would meet the tests of section 13(a)(4).

(c) Where two or more exemptions are applicable to an employee's work or employment during a workweek and where he may be exempt under a combination of exemptions stated above, the availability of a combination exemption will depend on whether the employee meets all the requirements of each exemption which it is sought to combine.

ENGAGING IN MANUFACTURING AND PROCESSING ACTIVITIES; SECTION 13(a)(4)

§ 779.345 Exemption provided in section 13(a)(4).

The section 13(a)(4) exemption (see § 779.301) exempts any employee employed by a retail establishment which meets the requirements for exemption under section 13(a)(2), even though the establishment makes or processes on its own premises the goods that it sells, provided, that more than 85 percent of such establishment's annual dollar volume of sales of the goods so made or processed is made within the State in which the establishment is located, and other prescribed tests are met.

§ 779.346 Requirements for exemption summarized.

An establishment to qualify for exemption under section 13(a)(4) must be an exempt retail establishment under section 13(a)(2); that is, 75 percent of its annual dollar volume of sales of goods must not be for resale, 75 percent of its annual dollar volume of sales of goods must be recognized as retail in its industry, over 50 percent of its annual dollar volume of sales of goods must be made within the State in which the establishment is located, and its annual dollar volume of sales must be under $250,000. In addition, the establishment must meet the following three tests:

(a) The establishment must be recognized as a retail establishment in the particular industry.

(b) The goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods.

(c) More than 85 percent of the establishment's annual dollar volume of sales of the goods which it makes or processes must be made within the State in which the establishment is located. (See Act, section 13(a)(2); H. Rept. No. 1453, 81st Cong. first session, p. 27; Arnold v. Ben Kanowsky, Inc., 361 U.S. 388.)

§ 779.347 Exemption limited to "recognized retail establishment"; factories not exempt.

The section 13(a)(4) exemption requires the establishment to be recognized as a retail establishment in the particular industry. This test limits the exemption to retail establishments only, and excludes factories as such and establishments to which the retail concept does not apply. In other words this test requires that the establishment as a whole be recognized as a retail establishment although it makes or processes at the establishment the goods it sells. Typical of the establishment which may be recognized as retail establishments under the exemption are custom tailor shops, candy shops, ice cream parlors, bakeries, drug stores, optometrist establishments, retail ice plants and other local retail establishments which make or process the goods they sell and meet the other tests for exemption. Clearly factories as such are not "recognized retail establishments" and would not be eligible for this exemption. (See 95 Cong. Rec. pp. 11001, 11200, 11216, and 14942.)

§ 779.348 Goods must be made at the establishment which sells them.

(a) Further to make certain that the exemption applies to retail establishments only and not to factories, an additional requirement of the exemption is that the goods which the exempt establishment makes or processes must be made or processed at the establishment which sells the goods. The exemption does not apply to an establishment which makes or processes goods for sale to customers who will go to other places to buy them. Thus an establishment that makes or processes any goods which the employer will sell from another establishment, is not exempt. If the establishment making the goods does not sell such goods but makes them for the purpose of selling them at other establishments the establishment making the goods is a factory and not a retail establishment.

(b) Where the making or processing of the goods takes place away from the selling establishment, the section 13(a)(4) requirement that both the making or processing and selling take place at the same establishment cannot be met. This will be true even though the place at which the goods are made or processed services the retail selling establishment exclusively. In such a situation, while the selling establishment may qualify for exemption under section 13(a)(2), the separate establishment at which the goods are made or processed will not be exempt. The latter is a manufacturing establishment. For example, a candy kitchen manufacturing candy for sale at separate retail outlets is a manufacturing establishment and not a retail establishment. (Fred Wolferman, Inc. v. Gustafson, 169 F. 2d 759 (CA-8.))

(c) The fact that goods made or processed on the premises of a bona fide retail establishment are sold by the establishment through outside salesmen (as, for example, department store salesmen taking orders from housewives for draperies) will not defeat the exemption if otherwise applicable. On the other hand, in the case of a factory or similar establishment devoted to making or processing goods, the fact that its goods are sold at retail by outside salesmen provides no ground for recognizing the establishment as a retail establishment or qualifying it for exemption.

§ 779.349 The 85-percent requirement.

The final requirement for the section 13(a)(4) exemption is that more than 85 percent of the establishment's sales of the goods it makes or processes, measured by annual dollar volume, must consist of sales made within the State in which the establishment is located. A retail establishment of the type intended to be exempt under this exemption may also sell goods which it does not make or process; the 85-percent requirement applies only to the sales of goods which are made or processed at the establishment. This must not be confused with the additional test which requires that the establishment, to be exempt, must derive more than 50 percent of its entire annual dollar volume of sales of goods from sales made within the State. (See § 779.339.) In other words, more than 85 percent of the establishment's annual dollar volume of sales of goods made or processed at the establishment, and more than 50 percent of the establishment's total annual dollar volume of sales of all the goods sold by the establishment, must be derived from sales made within the State. An establishment will not lose an otherwise applicable exemption under section 13(a)(4) merely because some of its sales of goods made or processed at the establishment are sales for resale or are not recognized as retail sales in the particular industry. Sales for resale, such as wholesale sales, and other sales not recognized as retail sales in the industry, will be counted in the 25-percent tolerance permitted by the exemption. (Cf. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388.) Thus, for example, a bakery otherwise meeting the tests of 13(a)(4) making and selling baked goods on the premises nevertheless will qualify as an exempt retail establishment even though it engages in the sale of baked goods to grocery stores for resale if such sales, together with other sales not recognized as retail in the industry, do not exceed 25 percent of the total annual dollar volume of the establishment.

§ 779.350 The section 13(a)(4) exemption does not apply to service establishments.

The section 13(a)(4) exemption applies to retail establishments engaged in the selling of goods. It does not apply to service establishments. If the establishment is a service establishment, it must qualify under section 13(a)(2) in order to be exempt. A retail establishment selling goods, however, also may perform services incidental or necessary to the sale of such goods, such as a delivery service by a bakery store or installation of antennas by a radio dealer for his customers, without affecting the character of the establishment as a retail establishment qualified for exemption under section 13(a)(4).

ENGAGING IN CONTRACT TELEGRAPH AGENCY OPERATIONS; SECTION 13(a)(11)

§ 779.351 Exemption provided.

Section 13(a)(11) (See § 779.301) exempts from sections 6 and 7 of the Act any employee or proprietor who is engaged in handling telegraphic messages for the public in a retail or service establishment which qualifies as an exempt retail or service establishment under section 13(a)(2), if the conditions specified in section 13(a)(11) are met and the provisions of section 6 and 7 of the Act would not otherwise apply.

§ 779.352 Requirements for exemption.

The requirements of the exemption are: (a) The establishment in which the employee or proprietor works must qualify as an exempt retail or service establishment under section 13(a)(2) of the Act; (b) the employee or proprietor must be engaged in handling telegraphic messages for the public pursuant to an agency or contract arrangement with a telegraph company; (c) such employee or proprietor must be one to whom the minimum wage and overtime pay provisions of the Act would not apply in the absence of such handling of telegraphic messages (See Western Union Tel. Co. v. McComb 165 F. 2d. 65 (CA-6), certiorari denied, 333 U.S. 362); and (d) the exemption applies only where the telegraphic message revenue does not exceed $500 a month. For purposes of this exemption only, in determining whether a retail or service establishment meets the percentage tests contained in section 13(a)(2) of the Act, the receipts from the telegraphic message agency will not be included.

CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

§ 779.353 Basis for classification.

The general principles governing the application of the 13(a)(2) and 13(a)(4) exemptions are explained in detail earlier in the subpart. It is the purpose of the following sections to show how these principles apply to establishments in certain specific industries. In these industries the Divisions have made special studies, held hearings or consulted with representatives of industry and labor, to ascertain the facts. Based upon these facts the following determinations have been made as to which sales or establishments are, and which are not, recognized as retail in the particular industry.

LUMBER AND BUILDING MATERIALS DEALERS

§ 779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) *Section 13(a)(2)*. An establishment engaged in selling lumber and building materials may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. It must appear that:

(1) The establishment is not in an enterprise described in section 3(s) of the Act or, if it is, its annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) is less than $250,000; and

(2) More than 50 percent of the establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located; and

(3) 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is made from sales which are not for resale and are recognized as retail sales of goods or services in the industry.

These requirements are further explained in §§ 779.301-779.343.

(b) *Section 13(a)(4).* An establishment which makes or processes lumber and building materials which it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements (see Arnold v. Kanowsky, 361 U.S. 388) of that exemption. It must appear that:

(1) The establishment qualifies as an exempt retail establishment under section 13(a)(2) (see paragraph (a) of this section and § 779.350); and

(2) The establishment is recognized as a retail establishment in the industry (see § 779.347 and paragraph (c) of this section); and

(3) The goods which such establishment makes or processes for sale are made or processed at the retail establishment which sells them (see § 779.348); and

(4) More than 85 percent of the annual dollar volume derived by the retail establishment from sales of goods so made or processed therein is made within the State in which the establishment is located (see §§ 779.349, 779.339 through 779.341).

(c) *Establishments recognized as retail in the industry.* An establishment which meets the requirements for exemption under section 13(a)(4) which are stated in paragraphs (b)(1), (3), and (4) of this section is recognized as retail establishment in the industry within the meaning of paragraph (b)(2) of this section if its annual dollar volume of sales of goods made or processed at the establishment does not exceed 50 percent of the annual dollar volume which it derives from sales that are recognized as retail and are not made for resale.

(d) *Establishments lacking a "retail concept."* The exemptions provided by sections 13(a)(2) and 13(a)(4) of the Act do not apply to establishments in an industry in which there is no traditional concept of retail selling or servicing (see § 779.316), such as the establishment of a building contractor (see § 779.317; Goldberg v. Dakota Flooring Co., 15 WH Cases 305), or a factory (see § 779.347).

§ 779.355 Classification of lumber and building materials sales.

(a) *General.* In determining, for purposes of the section 13(a)(2) and (4) exemptions, whether 75 percent of the annual dollar volume of the establishment's sales which are not for resale and are recognized as retail in the industry, such sales will be considered to include all sales of lumber and building materials by the establishment which meet all the requirements for such classification as previously explained in this subpart, but will not be considered to include the transactions noted in paragraphs (b) and (c) of this section, which do not meet the statutory tests:

(b) *Transactions not recognized as retail sales.* (See §§ 779.314 through 779.329.) Dollar volume derived from the following is not made from sales or services which are recognized as retail in the industry:

(1) Contracts to build, maintain, or repair buildings or other structures, or sales of services involving performance of typical construction activity or any other work recognized as an activity of a contracting business rather than a function of a retail merchant;

(2) Sales of lumber and building materials in which the seller agrees to install them for the purchaser, where the installation is not limited to serv-

ices that are merely incidental to the sale and delivery of such materials but includes a substantial amount of activity such as construction work which is not recognized as retail (for example, sale and installation of roofing, siding, or insulation). A sale of such materials which would otherwise be recognized as retail (contracts described in paragraph (b)(1) of this section are outside this category) may be so recognized notwithstanding the installation agreement, however, to the extent that the sales value of the materials is segregated and separately identified in the transaction;

(3) Sales in direct carload shipments; that is, where the materials are shipped direct in carload lots from the dealer's supplier to the dealer's customer;

(4) Sales of specialized goods (some examples are logs, ties, pulpwood, telephone poles, and pilings). Such specialized items are of the type which the general consuming public does not ordinarily have occasion to use (cf. § 779.318 and Mitchell v. Raines, 238 F. 2d 186), and the sales of such items are not recognized as retail in the industry;

(5) Sales made pursuant to formal bid procedures, such as those utilized by the Federal, State, and local governments and their agencies, involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications.

(c) *Sales for resale.* (See §§ 779.330–779.336.) Examples of sales which cannot be counted toward the required 75 percent because they are for resale include:

(1) Sales of lumber and building materials sold to other dealers for resale in the same form;

(2) Sales to industrial concerns for resale in any altered form or as a part or ingredient of other goods;

(3) Sales to contractors or builders for use in the construction, repair, or maintenance of commercial or industrial structures or any other structures not specifically included in section 3(n) of the Act (Sucrs. de Mayal v. Mitchell, 280 F. 2d 477, certiorari denied 364 U.S. 902; and see Arnold v. Kanowsky, 361 U.S. 388, 394, footnote 10, and §§ 779.335–779.336);

(4) Transfers of goods by an employer, who is a dealer in lumber and building materials and who also acts in the capacity of a building contractor or speculative builder, from or through his building materials establishment to his building business for the construction maintenance, or repair of commercial property or any other property not excepted in section 3(n) of the Act. (See § 779.336.)

§ 779.356 Application of exemptions to employees.

(a) *Employees who may be exempt under sections 13(a)(2) and 13(a)(4).* These exemptions apply on an establishment basis (see §§ 779.302–779.306). Accordingly, where an establishment of a dealer in lumber and building materials qualifies as an exempt retail or service establishment under section 13(a)(2) or as an exempt establishment under section 13(a)(4), as explained in § 779.354, the exemption from the minimum wage and overtime pay requirements of the Act provided by such section will apply, subject to the limitations hereafter noted in this section, to all employees who are employed "by" such establishment (see §§ 779.307–779.311) in activities within the scope of its business (§ 779.308) and who are not employed by the employer in performing central office or warehouse work of an organization operating several such establishments (§ 779.310; McComb v. W. E. Wright Co., 168 F. 2d 40, cert. denied 335 U.S. 854). Neither exemption extends to employees employed in performing the work of a nonexempt establishment (§ 779.311) or such activities as construction work. Employees employed in making and processing of lumber and building materials for sale do not come within the section 13(a)(2) exemption; they are exempt *only if employed* by an establishment which qualifies as an exempt establishment under section 13(a)(4) as explained in § 779.354 and if their work in the making or processing of such materials is done at such establishment. How duties relating to the processing or manufacturing of such materials affect the application of these exemptions is discussed in further detail in paragraphs (b) and (c) of this section.

(b) *Processing and manufacturing activities.* The performance, in an establishment which sells lumber and building materials at retail, of activities such as cutting lumber to a smaller size or dressing lumber in accordance with a customer's request or assembling window and door frames received in "knocked-down" condition, constitutes processing incidental to the sales of such materials. Such activities are not considered manufacturing and will not affect the applicability of the section 13(a)(2) exemption to the establishment or to the employees who perform them. However, whenever lumber is cut or dressed for sale, or fabricated products are manufactured for sale (for example, windows, door frames, benches, pig troughs, pallets, molding, sashes, cabinets, boxes), there is no exemption under section 13(a)(2). Employees performing such manufacturing activities at the establishment are exempt only if all the tests set forth in section 13(a)(4) are met (see pars. (b), (c), and (d) of § 779.354). Employees engaged in such activities at a manufacturing plant, central yard, or other place not qualifying as an exempt establishment under section 13(a) (2) and (4) are not exempt.

(c) *Employees serving exempt and nonexempt operations.* In lumber and building materials establishments which qualify for exemption under section 13(a)(2) but engage in some activities in which their employees are not exempt, such as construction or the making or processing of materials for sale where no exemption under section 13(a)(4) is applicable, there may be auxiliary employees of the establishment whose duties relate to both the exempt sales portion of the business and the non-exempt operations. For example, office workers may keep records of both the retail sales and construction or manufacturing activities; custodial workers may clean the entire premises, including portions devoted to nonexempt manufacturing; and warehousemen, messengers, and stock clerks may handle material for all departments, including material used in the nonexempt operations. These employees do not qualify for the exemption except when they are primarily engaged in the sales portion of the business and only incidentally perform clerical, custodial, or messenger service for the other operations. As an enforcement policy, such an employee will not be considered to be engaged in nonexempt activities which render him ineligible for exemption under section 13(a)(2) if, in the particular workweek, an insubstantial amount of his time (20 percent or less) is allocable to the clerical, custodial, or messenger services performed by him which relate to such nonexempt operations of the employer.

COAL DEALERS

§ 779.357 May qualify as exempt 13(a)(2) establishments; classification of coal sales.

(a) *General.* A coal dealer's establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. In determining for purposes of the 13(a)(2) exemption, whether 75 percent of the establishment's sales are recognized as retail in the particular industry, sales of coal to the consumer from a dealer's yard storage, where bulk is broken, are recognized as retail if they meet the requirements for such classification as previously explained in this subpart. It has been determined that the following sales do not meet such requirements and are not so recognized even if made from a dealer's yard storage:

(1) Sales where the delivery is made by railroad car or cargo vessel.

(2) Sales in a carload quantity or more for continuous delivery by truck from a dock, mine or public railroad facility.

(3) Sales of coal at a wholesale price. A wholesale price is a price comparable to or lower than the establishment's price in sales described in paragraphs (a)(1) and (2) of this section or in sales to dealers (but not peddlers) for resale. If the establishment makes no such sales, the wholesale price is

the price comparable to or lower than the price prevailing in the immediate area in sales described in paragraphs (a)(1) and (2) of this section or in sales to dealers (but not peddlers) for resale.

(4) Sales of coal for use in the production of a specific product to be sold in which coal is an essential ingredient or the principal raw material, such as sales of coal for the production of coke, coal gas, coal tar, or electricity.

(b) *"Sales for resale."* In determining for purposes of the 13(a)(2) exemption, whether 75 percent of the establishment's sales are not made for resale, "sales for resale" will include sales of coal to other dealers, to peddlers, and sales of coal for use in the production of a specific product to be sold, in which coal is an essential ingredient or the principal raw material, such as sales of coal for the production of coke, coal gas, coal tar, or electricity. This is distinguished from sales of coal for use in the general manufacturing or industrial process such as the use in laundries, bakeries, nurseries, canneries, etc., or for space heating, which are not sales made for resale.

ICE MANUFACTURERS AND ICE DEALERS

§ 779.358 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in selling ice may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, an establishment making the ice it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) In determining whether the requirements of the 13(a)(2) exemption that 75 percent of the establishment's sales must not be made for resale and must be recognized as retail sales in the industry are met, sales of ice which meet all the requirements for such classification as previously explained in this subpart will be regarded as retail. The following sales have been determined not to qualify under the applicable tests for recognition as retail:

(1) Sales for resale.

(2) Sales of ice for icing railroad cars and for icing cargo trucks. However, sales of ice for the re-icing of cargo trucks are recognized as retail if such sales do not fall into the nonretail categories described in paragraphs (b) (4) and (5) of this section.

(3) Sales of ice in railroad car lots.

(4) Sales of ice of a ton or more.

(5) Sales of ice at a price comparable to that charged by the establishment to dealers or, if no sales are made to dealers by the establishment, at a price comparable to or lower than the prevailing price to dealers in the area.

(c) The legislative history indicates that iceplants making the ice they sell are among the establishments which may qualify as retail establishments under the section 13(a)(4) exemption. It appears that all iceplants which sell at retail are establishments of the same general type, permitting no separate classifications with respect to recognition as retail establishments. Any iceplant which meets the tests of section 13(a)(2) will, therefore, be considered to be recognized as a retail establishment in the industry. Of course, the establishment must also meet all the other tests of section 13(a)(4) to qualify for the exemption.

(d) There are some iceplants which meet the section 13(a)(2) exemption requirements, but do not meet all of the section 13(a)(4) requirements. In such establishments, there may be some employees whose duties relate to both the sales portion of the business and the making or processing of ice. These employees will not qualify for exemption. However, in such establishment, there may be some employees who work primarily for the retail sales portion of the business and also perform incidental clerical, custodial, or messenger service for the manufacturing operation. For example, office workers may keep records of both the manufacturing activities and of the retail sales departments, maintenance workers may clean up in both parts of the establishment, and messengers may perform services for both activities. If these employees spend relatively little time in the work related to the ice manufacturing portion of the business, they will not, as an enforcement policy, be regarded as engaged in the making or processing of ice. Such an auxiliary employee will thus be exempt under section 13(a)(2) in any workweek in which an insubstantial amount of his time (20 percent or less) is allocable to the clerical, messenger, or custodial work of the ice manufacturing operations.

LIQUEFIED-PETROLEUM-GAS AND FUEL OIL DEALERS

§ 779.359 May qualify as exempt 13(a)(2) establishments.

A liquefied-petroleum-gas or fuel oil dealer's establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. (It should be noted, however, that employees of certain enterprises engaged in the wholesale or bulk distribution of petroleum products may be partially exempt from the overtime provisions of the Act under section 7(b)(3). This overtime exemption is discussed in a separate bulletin, Part 794 of this chapter. Liquefied-petroleum-gas means butane, propane and mixtures of butane and propane gases.

§ 779.360 Classification of liquefied-petroleum-gas sales.

(a) *General.* In determining, under the 13(a)(2) exemption, whether 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, sales to the ultimate consumer of liquefied-petroleum-gas, whether delivered in portable cylinders or in bulk to the customer's storage tanks, are recognized as retail in the industry if they meet all the requirements for such classification as previously explained in this subpart. The following are not recognized as retail:

(1) Sales in single lot deliveries exceeding 1,000 gallons;

(2) Sales made on a competitive bid basis (this term covers sales made pursuant to an invitation to bid, particularly sales to Federal, State and local governments; sales made in a like manner to commercial and industrial concerns and institutions are also included); and

(3) Sales for use in the production of a specific product in which the gas is an essential ingredient or principal raw material, such as sales of liquefied-petroleum-gas for the production of chemicals and synthetic rubber; and

(4) Sales of liquefied-petroleum-gas for use as truck or bus fuel and the repair and servicing of trucks and buses used in over-the-road commercial transportation (including parts and accessories for such vehicles).

(b) *Sales or repairs of tanks.* Sales or repairs of tanks for the storage of liquefied-petroleum-gas are recognized as retail in the industry, except: (1) Any tank exceeding 1,000 gallons in capacity; (2) any tank sold or repaired on the basis described in paragraph (a)(2) of this section or for the purposes described in paragraph (a)(3) of this section; and (3) sales in quantity larger than involved in the ordinary sales to a farm or household customer.

(c) *Conversion units.* Sales and installation of units for converting pumps, stoves, furnaces and other equipment and appliances to the use of liquefied-petroleum-gas, are recognized as retail sales except: (1) Sales of the installation of such conversion units which involve substantial modification of the appliance or equipment; (2) sales and installation of such units to be used in industrial machinery or equipment; (3) sales and installations made on the basis described in paragraph (a)(2) of this section or in quantity as described in § 779.327; and (4) sales and installation of such units for vehicles mentioned in paragraph (a)(4) of this section.

§ 779.361 Classification of other fuel oil sales.

(a) Sales of fuel oil (as differentiated from sales of butane and propane gases) are classified as retail and nonretail sales as follows:

(1) Retail sales—all sales of grades No. 1, No. 2, and No. 3 of fuel oil direct to housholders for their own domestic uses;

(2) Nonretail sales—

(i) All sales of grades No. 4, No. 5, and No. 6 fuel oil as these heavy oils are "special purpose" goods to which the retail sales concept has no application (See § 779.321);

(ii) All sales for resale including such sales to peddlers and other dealers (See §§ 779.331-779.334);

(iii) All sales made pursuant to a formal invitation to bid (See § 779.328(d)).

(b) In some cases the retail or nonretail status of an establishment may turn on sales other than those listed above. In such cases all the facts relative to such sales shall be considered in arriving at a determination. The classification of such sales depends upon whether they are recognized as retail sales. In such cases particular attention shall be given to the quantities involved and the prices charged.

FEED DEALERS

§ 779.362 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in selling feed may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly an establishment making and processing the feed it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, sales of feed to feeders will generally meet the requirements for such classification as previously explained in this subpart and will ordinarily be considered to be retail sales except for the following which do not meet the requirements and are not recognized as retail: Any sale of feed for shipment by railcar direct to the feeder; and sales made at a quantity discount which results in a price comparable to or lower than the establishment's price to dealers for resale or, if the establishment makes no sales to other dealers, at a price comparable to or lower than the price prevailing in the immediate area in sales by similar establishments to dealers for resale.

(c) The custom grinding and mixing of feed (including the addition of supplements) for feeders from the grain they themselves bring in will be regarded as the performance of a service, and not the making or processing of goods for sale under section 13(a)(4). Such services are recognized as retail services in the industry and the revenue derived therefrom will be included with the retail receipts of the establishment.

(d) Employees employed in the grinding and mixing of feed for sale (as distinguished from the grinding and mixing services discussed in paragraph (c) of this section) are engaged in the making or processing of goods and are therefore not exempt under section 13(a)(2). In order for these employees to be exempt, the establishment by which they are employed must meet all the requirements of section 13(a)(4), including the requirement that the establishment must be recognized as a retail establishment in the particular industry. The typical small feed mill engaged in selling goods to farmers appears to be recognized as retail in the industry. There are, of course, large mills which are essentially factories which are not so recognized. As an enforcement policy an establishment which qualifies for exemption under section 13(a)(2) will be considered to have met this requirement (1) if less than 50 percent of its retail sales are composed of feed manufactured at the establishment; or (2) if its sales of feeds manufactured at the establishment do not exceed 2,000 tons a year. In determining these tests for the applicability of the exemption, the computation of the sales of feed manufactured will be made on an annual basis in the same manner as set forth in §§ 779.265 through 779.269 for the computation of sales.

MONUMENT DEALERS

§ 779.363 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in the sale of monuments and memorials may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, an establishment making or processing the monuments it sells may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) Monument dealers' establishments may be roughly divided into four types;

(1) Establishments which are engaged exclusively in selling monuments and memorials from designs. They receive their monuments from a manufacturer completely finished and lettered and they then erect the monuments.

(2) Establishments which purchase finished monuments from manufacturers, display them, carve or sandblast lettering or incidental decoration to order, and set them in cemeteries or elsewhere.

(3) Establishments which purchase finished and semi-finished work. The semifinished work consists of sawed, steeled, or polished granite slabs or sand-rubbed marble. In such a case the establishments will cut ends, tops, or joints on dies and may shape a base.

(4) Establishments which purchase stone in rough form and perform all the fabricating operations in their own plants. In such a case the establishments may saw or line-up the rough stones, machine surface and polish the stone and then perform the other operations necessary to complete the monument. They may finish the monuments for display or on special order and then erect them.

(c) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, the ordinary sale of a single tombstone or monument to the ultimate purchaser will be considered as a retail sale within the meaning of the exemption. If the monument dealer establishment meets all the tests of the 13(a)(2) exemption all employees employed by it will be exempt under that exemption except those employees who are engaged in the making or processing of the goods. However, carving or sandblasting of lettering or incidental decoration or erecting the monuments, is considered processing incidental to the making of retail sales and would not defeat the 13(a)(2) exemption for employees performing such work. Employees who engage in processing semifinished or rough granite or marble or other stone into finished monuments such as the work performed in establishments described in paragraphs (b) (3) and (4) of this section are engaged in the making or processing of goods and are, for that reason, not exempt under section 13(a)(2). In order for those employees to be exempt the establishment by which they are employed must meet all the requirements of the 13(a)(4) exemption.

(d) One of the requirements of the section 13(a)(4) exemption is that an establishment which makes or processes goods must be recognized as a retail establishment in the industry. Generally an establishment described in paragraph (b)(3) of this section which receives finished stock and in addition receives some semifinished work, including sawed, steeled, or polished granite slabs or sand-rubbed marble, etc., and performs such operations as cutting ends, tops, or joints on the dies, is a type of establishment which is recognized as a retail establishment in the industry. On the other hand, those establishments which characteristically engage in the sawing or lining up of rough stone, or in the machine surfacing and polishing of stone, such as the activities performed in an establishment described in paragraph (b)(4) of this section, are not recognized as retail establishments in the particular industry within the meaning of section 13(a)(4). Therefore, their employees who engage in such processing of monuments are not exempt under this section of the Act.

FROZEN-FOOD LOCKER PLANTS

§ 779.364 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in providing frozen-food locker service to farmers and other private individuals and rendering services thereto may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Similarly, a frozen-food locker plant which also engages in slaughtering and dressing livestock or poultry for sale may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) *Activities of frozen-food locker plants.* Frozen-food locker plants provide locker service for the cold storage of frozen meats, fruits, and vegetables and engage in incidental activities such as the cutting of meat, cleaning, packaging or wrapping and quick freezing, of meats, fruits, or vegetables for such locker service. In such establishments lockers are rented principally to farmers and other private individuals for the purpose of storage by them of such goods for their own personal or family use. Storage space and related services may also be provided for business or commercial use such as to hotels, stores or restaurants, or to farmers or other customers who use it to store meat and other goods for future sale. Such locker plants may also engage in such activities as the custom slaughtering and dressing of livestock or poultry and the curing, smoking, or other processing of meat owned by farmers and other private individuals for storage by those customers either in their home freezers or in locker plants for the customers' personal or family use. The custom slaughtering or processing activities of such locker establishments may be performed on the premises of the establishments or at some location away from the establishment.

(c) *Classification of sales.* In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not for resale and are recognized as retail sales in the industry, the receipts from the locker service and the incidental activities mentioned in the first sentence of this section and from the slaughtering, dressing, or other processing of livestock or poultry performed for farmers and other private individuals for their own use, but not where the goods are to be sold to others by the customer, will be counted as receipts from sales of services recognized as retail in the industry. Receipts from commercial storage and activities incidental thereto and from the sale of hides, offal or other byproducts will be counted as receipts from sales of goods or services made for resale or which are not recognized as retail sales of goods or services in the industry.

(d) Some locker plant establishments also include a meat market of the type which slaughters its own livestock or poultry (as distinguished from the slaughtering performed as a service to customers on the customers' own livestock) and processes such meat for sale by it to the general public. In performing such operations as the slaughtering, curing, and smoking of meat and the rendering of fats for sale, the establishment is making or processing goods that it sells and is not performing retail services for its customers. Employees engaged in these activities in such an establishment, therefore, are not exempt under section 13(a)(2) but may be exempt if the establishment meets the tests of a combination 13(a)(2)-13(a)(4) exemption in accordance with the principles stated in § 779.343. As a general rule, such a meat market which slaughters its own livestock and sells its meat to the general public is a type of establishment which may be recognized as a retail establishment in the industry within the meaning of the 13(a)(4) exemption. Whether a particular establishment, however, is so recognized depends upon the facts of the case. It should be noted that where such slaughtering, curing or smoking is, for any reason, performed away from the premises of the establishment where the meat is sold, the employees engaged in such activities are not employees employed by a retail establishment which "makes or processes at the retail establishment the goods that it sells" within the meaning of the 13(a)(4) exemption and cannot, therefore, be exempt under that section.

AUTOMOTIVE TIRE ESTABLISHMENTS

§ 779.365 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

(a) An establishment engaged in the selling of tires, tubes, accessories and of repair services on tires may qualify as an exempt retail or service establishment under section 13(a)(2) of the

Act if it meets all the requirements of that exemption. Similarly, an establishment engaged in retreading or recapping tires may qualify as an exempt establishment under section 13(a)(4) of the Act if it meets all the requirements of that exemption.

(b) (1) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are not made for resale and are recognized as retail sales in the industry, sales other than those described hereinafter in the subparagraphs of this paragraph may be so counted if they meet all the requirements for such classification as previously explained in this subpart. Not eligible for inclusion in the requisite 75 percent are sales of goods that cannot be the subject of a retail sale because the goods are not of a "retailable" type or the sales of such goods lack the "retail concept" (see § 779.321). Nor can sales for resale be counted toward the 75 percent. For example, sales of tires, tubes, accessories or services to garages, service stations, repair shops, tire dealers and automobile dealers, to be sold or to be used in reconditioning vehicles for sale are sales for resale. Further, the sales of tires, tubes, accessories and tire repair services, including retreading and recapping, which are described in the following paragraphs (b) (2) through (7), are not recognized as retail in the industry.

(2) Sales made pursuant to a formal invitation to bid: Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, State and local governments are typically made in this manner.

(3) Sales to "national accounts" as known in the trades; that is, sales where delivery is made by the local tire dealer under a centralized pricing arrangement between the customer's national office and the tire manufacturer; payment may be made either to the local dealer or direct to the tire manufacturer under a centralized billing arrangement with the customer's national office.

(4) Sales to fleet accounts at wholesale prices: As used in this section, a "fleet account" is a customer operating five or more automobiles or trucks for business purposes. Wholesale prices for tires, tubes, and accessories are prices equivalent to, or less than, those typically charged on sales for resale. If the establishment makes no sales of passenger car tires for resale, the wholesale price of such tires will be taken to be the price typically charged in the area on sales of passenger car tires for resale. If the establishment makes no sales of truck tires for resale, the wholesale price of such tires will be taken to be the price charged by the establishment on sales of truck tires to fleet accounts operating 10 or more commercial vehicles, or if the establishment makes no such sales, the wholesale price will be taken to be the price typically charged in the area on sales of truck tires to fleet accounts operating 10 or more commercial vehicles. (See Wirtz v. Steepleton General Tire, 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

(5) Sales of a tire rental service on a mileage basis known in the trade as "mileage contracts": This is a leasing arrangement under which a tire dealer agrees to provide and maintain tires or tubes for motor vehicles of a fleet account.

(6) Sales of servicing and repair work performed under a fleet maintenance arrangement on tires for trucks and other automotive vehicles whereby the establishment undertakes to maintain the tires or tubes for a fleet account at a price below the prevailing retail price.

(7) Sales, repair, recapping, or rental of truck or machinery tires suitable for use only on trucks or equipment of a specialized kind that cannot themselves be the subject of a retail sale because their lack of a concept of "retailability" as previously explained precludes the recognition of their sale as "retail;" to any industry.

§ 779.366 Recapping or retreading tires for sale.

(a) Some automotive tire establishments engage in recapping and retreading work on tires which the establishment expects to sell in their reconditioned form. Such activities are not performed as a service for a customer but constitute manufacturing goods for sale. Employees performing such work may be exempt only if they are employed by an establishment which meets all the requirements of the 13(a)(4) exemption.

(b) For purposes of meeting the retail recognition requirement of section 13(a)(4), an establishment engaged in retreading or recapping of tires which qualifies for exemption under section 13(a)(2) is recognized as a retail establishment in the industry if not more than 50 percent of the annual dollar volume of its sales resulting from its retreading and recapping operations comes from the sale of tires retreaded and recapped for sale.

COMMERCIAL STATIONERS

§ 779.367 Commercial stationers may qualify as exempt 13(a)(2) establishments.

(a) A commercial stationer's establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that exemption. Where the establishment meets these requirements all employees employed by the establishment will be exempt, except any employees who are engaged in the making or processing of goods, such as printing and engraving. The commercial stationer ordinarily has a store on the street level located in the shopping section of the community where other stores are located and many people pass by. He has store clerks who sell over the counter to the consuming public and may have outside salesmen who sell to offices. He makes very few, if any, sales to other dealers for resale. He keeps in stock and displays the various items sold over the counter and by outside salesmen. The number of items in stock typically ranges from 5,000 to 15,000. Primarily, items sold are stationery, pens, pencils, blotters, briefcases, calendars, clocks, greeting cards, thumbtacks, typewriter ribbons, carbon paper, paper clips, ink, commercial envelopes and typewriter paper, filing supplies and similar items. In addition he may also sell filing cabinets, office desks and chairs, other items of office furniture and supplies and equipment generally, as well as standard and portable typewriters and certain other small office machines.

(b) In determining whether, under the 13(a)(2) exemption, 75 percent of the establishment's sales are recognized as retail sales, in the case of commercial stationery establishments which in general operate as described in § 779.367(a), the sales made which are of "Retailable" items and are not for resale will be recognized as retail if they meet the requirements for such classification as previously explained in this subpart. The following position is adopted for enforcement purposes: All sales other than for resale of stationery, office supplies and equipment, office furniture and office machinery commonly stocked by commercial stationers for sale to individual consumers as well as businesses, including typewriters, adding machines, small duplicating machines, checkwriters, and the like, will be considered to be retail except for the sales set out below:

(1) Sales made on a competitive bid basis. This term covers sales made pursuant to an invitation to bid, particularly sales to Federal, State, and local governments; sales made in a like manner to commercial and industrial concerns and institutions are also included.

(2) Sales made pursuant to a requirements contract or other contractual arrangement involving the sale of a large quantity of goods over a period of time with a substantially lower price structure for the individual deliveries than would prevail for the usual sales of the quantities delivered.

(3) Sales made at quantity discount of 30 percent or more from the price of the ordinary unit of sale.

(4) Sales of school supplies to municipalities, boards of education, or schools in the same manner as the sales of school supply distributors.

(5) Sales of job printing and engraving other than (i) sales of social printing and engraving and (ii) sales of printing and engraving of business envelopes, letterheads, and calling cards.

(6) Sales of specialized machinery and equipment.

§ 779.368 Printing and engraving establishments not recognized as retail.

(a) An establishment which is engaged in printing and engraving is not recognized as a retail establishment for purposes of section 13(a)(4). Therefore, employees of a stationery establishment engaged in printing and/or engraving do not come within the exemption. This fact will not affect the exemption under section 13(a)(2) of employees of stationery establishments who are not engaged in printing or engraving.

(b) In a combined stationery and printing or engraving establishment there are employees who operate the machines in the printing or engraving department and there may be other employees who also perform work primarily or exclusively for that department. There are in addition various employees in such combined establishments whose work relates to the stationery portion of the business but who also perform some work for the printing department. For example, office workers may keep records of both the printing plant and stationery department, maintenance workers may clean up in both departments; and warehousemen, messengers and stock clerks may handle material for both departments. In some establishments these workers spend relatively little time in the work of the printing department. As an enforcement policy an auxiliary employee will not be considered to be engaged in the making or processing of goods for purposes of the exemption under section 13(a)(2) in any workweek in which an insubstantial amount of his time (20 percent or less) is allocable to the clerical, messenger, or custodial work of the printing department.

FUNERAL HOMES

§ 779.369 Funeral home establishments may qualify as exempt 13(a)(2) establishments.

(a) *General.* A funeral home establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that section. Where the establishment meets these requirements generally all employees employed by the establishment will be exempt except any employees who perform any work in connection with burial insurance operations (see paragraph (b)) or who spend a substantial portion of their workweek in ambulance service operations, as described in paragraph (e) below.

(b) *Burial insurance operations.* There is no retail concept applicable to the insurance business (see § 779.317). Burial associations which enter into burial insurance contracts are generally regulated by the State and the regulations governing such associations are included in State statutes under Insurance. The contracts issued are very similar in form and content to ordinary life insurance policies. Income received from such operations is nonretail income and employees engaged in such work are not employed in work within the scope of the retail exemption (see § 779.308).

(c) *Accommodation items.* Amounts paid to funeral homes to cover the cost of "accommodation" items are part of the gross receipts of the establishment and are included in its annual gross volume of sales made or business done. Such items may include goods or services procured by the funeral home on behalf of the bereaved with or without profit but on its own credit or through cash payment by it, such as telegrams, long distance calls, newspaper notices, flowers, livery service, honoraria to participating personnel, transportation by common carrier, clothing for the deceased, and transcripts of necessary forms. For the purposes of determining the applicability of the retail or service establishment exemption, receipts of the funeral home in reimbursement for such services are considered derived from sales or services recognized as retail in the industry. Cash advances made as a convenience to a bereaved family are not included in computing the gross volume of sales made of business done when repaid. Of course, if interest is charged it would be included in the gross volume of sales and nonretail income.

(d) *Nonretail services.* Calling for and preparing bodies and crematory service for other funeral homes, burial insurance operations, and ambulance or livery transportation service (as distinguished from the use of ambulances or other vehicles as a necessary part of the undertaking, funeral, or burial services of the establishment), are some examples of a funeral home providing goods or services which will be "resold" or which are not recognized as retail.

(e) *Ambulance service.* The typical ambulance service establishment, engaged exclusively or nearly so in providing a specialized form of transportation for sick, injured, aged, or handicapped persons, is a part or branch of the transportation industry. Since there is no traditional retail concept in the transportation industry, such ambulance service establishments cannot qualify for the section 13(a)(2) exemption (see § 779.317). Income from the same typical ambulance services would be considered nonretail in applying the 25 percent tolerance for nonretail income in a funeral home. If an establishment engaged in a combination of funeral home and ambulance services meets all the tests for exemption under section 13(a)(2), as applied to the combined sales of both types of services, those of its employees who are engaged in the funeral home's activities and functions will be exempt as employees of a retail or service establishment. This exemption, however, does not apply to any employee regularly engaged in nonexempt ambulance transportation activities in any workweek when he devotes a substantial amount of his working time to such nonexempt work. More than 20 percent of the employee's working time in the workweek will, for enforcement purposes, be considered substantial.

(f) *Out-of-State sales.* An arrangement with a funeral home to embalm and ship human remains to a point outside the State for burial is not a sale within the State. The reverse situation where an out-of-State funeral director ships the remains to a funeral home to arrange for local interment also is not a sale within the State.

(g) *Work for more than one establishment.* Employees performing central office, supply, or warehouse functions for more than one funeral home establishment are not within the exemption (see § 779.310). However, where certain mortuaries may operate more than one exempt establishment and where employees such as embalmers employed by an exempt funeral home may be called upon in a given workweek to perform for another exempt establishment or establishments in the same enterprise work which is a part of the funeral home services sold by that establishment or establishments to customers, such employees do not lose the exemption where at all times during the workweek the employee is employed by one or the other of such exempt establishments either inside or outside the establishment in the activities within the scope of its own exempt business (see § 779.311(b)). In addition, where an establishment offering complete funeral home services also has outlying chapels where only the funeral services of the deceased persons are conducted, employees of the main establishment who are otherwise exempt do not lose the exemption by virtue of the activities which they may perform in connection with the funeral services held at the chapel. These activities are in such a case part of their employment by the exempt main establishment.

CEMETERIES

§ 779.370 Cemeteries may qualify as exempt 13(a)(2) establishments.

(a) *General.* A cemetery may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if it meets all the requirements of that section, including the requirement that the retail or service establishment be open to the general public. So long as a cemetery is open to any persons of a particular religion rather than merely the members of a specific organization or place of worship, it will be considered for enforcement purposes to be "open to the general public."

(b) *Annual dollar volume.* As used in the Act, annual gross volume means the gross receipts from all the business activities of the establishment during a 12-month period (see §§ 779.265 through 779.269). Sums received from the following types of transactions are part of the annual gross volume of sales made or business done:

(1) Sales of lots or plots.

(2) Annual tax or assessment levied on lot owners, and

(3) Gifts or bequests.

Interest from any trust funds for permanent or current maintenance is also included in the annual gross volume of sales made or business done. The allocation of the gross receipts to any trust funds or other accounts of the establishment does not affect the annual gross volume.

(c) *Nonretail sales or income.* Sales of lots or plots to a burial society or a fraternal organization for the use of the members are sales for resale and as such may not be counted as part of the 75 percent of annual dollar volume of sales of goods or services which is not for resale and recognized as retail in the industry under section 13(a)(2). Such sales are counted as part of the annual gross volume in the period in which the transaction between the cemetery and the burial society or fraternal organization is completed. Any interest from trust funds or other investments also is not recognized as retail receipts under section 13(a)(2).

AUTOMOBILE, TRUCK, FARM IMPLEMENT, TRAILER, AND AIRCRAFT SALES AND SERVICES

§ 779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).

(a) *General.* The specific exemption from the provisions of sections 6 and 7 of the Act that was provided in section 13(a)(19) prior to the 1966 amendments for employees of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements was repealed. However, some such establishments may qualify for exemption from both the minimum wage and overtime pay provisions of the Act under section 13(a)(2) as retail or service establishments. These are establishments whose annual dollar volume is smaller than the amount specified in section 13(a)(2) or in section 3(s)(1) and which meet all the other requirements of section 13(a)(2) (see § 779.337). (Such establishments which do not qualify for exemption under section 13(a)(2) may have certain employees who are exempt only from the overtime pay provisions of the Act under section 13(b)(10). Section 13(b)(10) is applicable not only to automobile, truck, and farm implement dealers but also to dealers in trailers and aircraft. The section 13(b)(10) exemption is discussed in § 779.372 below.)

(b) *Application of the 75-percent test.* In determining whether, under the section 13(a) (2) exemption, 75 percent of an automobile, truck, or farm implement establishment's sales of goods or services are not for resale and are recognized as retail, the requirements for such classification, including the existence of a retail concept, as explained previously in this subpart, and the specific applications in the industry of these requirements in accordance with the following principles, will govern the classification of sales made by such establishments. The sales of goods or services described in paragraph (c) of this section and in paragraph (e) (1) through (5) of this section may not be counted toward the required 75 percent. Such sales do not qualify as retail because they either are for resale, are outside the retail concept, or have been determined to lack the requisite recognition as retail sales or services. Other sales of goods or services by the dealer can qualify if they meet the requirements previously explained.

(c) *Nonretail automobile and truck sales and servicing.* None of the following sales of automobiles, trucks, automotive parts, accessories, servicing and repair work will be considered as retail:

(1) Sales for resale: For example, sales of new or used automobiles and trucks, tires, accessories or services, to service stations, repair shops and automobile or truck dealers, where these establishments resell the various items or where they use them in repairing customers' vehicles or in reconditioning used cars for resale, are sales for resale. (Note that a "sale" for purposes of the Act need not be for profit under section 3(k) it includes any "exchange * * * or other disposition".)

However, internal transfers of such items between departments within the dealer's establishment, such as transfers of parts from the parts department to the service department of an automobile dealer's establishment, will not be considered sales for resale. Such transfers from one department to another will be disregarded in computing the establishment's sales for determining the applicability of this exemption.

(2) Sales made pursuant to a formal invitation to bid: Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to the Federal, State, and local governments are typically made in this manner.

(3) Fleet sales: Sales in a fleet quantity for business purposes (a sale of five or more cars or trucks at a time, for example); and sales to fleet accounts as described in paragraphs (c)(3) (i) and (ii) of this section. (As here used, a "fleet account" is a customer operating five or more automobiles or trucks for business purposes.)

(i) Automobiles and trucks: Sales and term leases of automobiles and trucks to national fleet accounts as designated by the various automotive manufacturers, at fleet discounts, and sales and term leases to other fleet accounts at discounts equivalent to those provided in sales to national fleet owners are not recognized as retail.

(ii) Automotive parts and accessories: Sales of parts and accessories to fleet accounts at wholesale prices are not recognized as retail. Wholesale prices are prices equivalent to, or less than, those typically charged on sales for resale.

(4) Sales and term leases of specialized heavy motor vehicles or bodies (16,000 pounds and over gross vehicle weight) and of tires, parts, and accessories designed for use on such specialized equipment. The following is a partial list illustrating the types of items of equipment not considered to qualify as subjects of retail sale:

(i) Single unit trucks, including—

Armored (money carrying).
Buses (integral).
Coal.
Drilling.
Dump.
Hook and ladder (fire department).
Chemical wagons (fire department).
Garbage.
Mixer.
Refrigerator.
Special public utility.
Steel haulers.
Street-cleaning.
Tank.
Wrecker.

(ii) Full trailers and semitrailers (tractors and semitrailer and truck and trailer combinations), including—

Auto carrier.
Coal.
Dump.
Garbage.
House carrier.
Low bed carry all.
Pole (lumber).
Refrigerator.
Tank.
Van.

(5) Sales of servicing and repair work peculiar to the servicing and repair of specialized vehicles referred to in paragraph (c)(4) of this section, or performed under a fleet maintenance arrangement on trucks and other automotive vehicles whereby the establishment undertakes to maintain a customer's fleet at a price below the prevailing retail prices.

(6) Sales to motor carriers of services, fuel, equipment, or other goods or facilities by establishments commonly referred to as truck stops. Such establishments, which are physically laid out and specially equipped to meet the highway needs of the motor transportation industry, offer a variety of services to truckers on a "one-stop" basis, and provide services principally to motor carriers and their crews. They are an integral part of the interstate transportation industry and are not within the traditional retail establishments (see paragraphs (c) (4) and (5) of this section).

(7) Sales of diesel fuel (and LP gas) for use as truck or bus fuel and the repair and servicing of trucks and buses used in over-the-road commercial transportation (including parts and accessories for such vehicles) are

specialized goods and services "which can never be sold at retail * * * whatever the terms of the sale." (Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 202, rehearing denied 383 U.S. 963; Wirtz v. Steepleton General Tire Company, Inc., 383 U.S. 190, 202, rehearing denied 383 U.S. 963.) Sales of these items are nonretail whether made by truck stops or other establishments (see paragraphs (c) (4) and (5) of this section).

(d) *Nonspecialized truck parts, accessories and services.* Sales of parts and accessories which are of the type used by small trucks engaged in local transportation or by farm vehicles and are not nonretail under paragraph (c)(6) of this section will be tested under paragraphs (b) and (c)(3) (ii) of this section, even when made on occasion for use in larger vehicles. Likewise, repairs and servicing of a minor nature (such as tire repair, battery recharging, cleaning of fuel lines, or minor electrical rewiring) performed on any type vehicle will be considered retail in nature unless nonretail under paragraph (c)(6) of this section or unless a fleet maintenance arrangement as in paragraph (c)(5) of this section is present.

(e) *Farm implement sales.* Sales of farm machinery, such as equipment necessary for plowing, planting, thinning, weeding, fertilizing, irrigating, and harvesting of crops, and raising of livestock on the farm, and the repair work thereon, will be considered as retail (whether sold to farmers or nonfarmers) when they satisfy the tests referred to in paragraph (b) of this section. The following, which fail to satisfy these tests, must be classified as nonretail:

(1) Sales for resale: For example, sales of new or used machinery, parts, accessories or services to service stations, repair shops and other dealers, where these establishments resell these items or where they use them in repairing customers' farm implements or in reconditioning used farm implements for resale, are sales for resale. However, this does not apply to internal transfers of such items between departments within the dealer's establishment. Transfers of parts from the parts department to the service department of a farm implement dealer's establishment will not be considered sales for resale, and will be disregarded in computing the establishment's sales for determining the applicability of the section 13(a)(2) exemption.

(2) Sales made pursuant to formal invitation to bid. Such sales are made under a procedure involving the issuance by the buyer of a formal invitation to bid on certain merchandise for delivery in accordance with prescribed terms and specifications. Sales to Federal, State and local governments are typically made in this manner.

(3) Sales of specialized equipment not ordinarily used by farmers, such as:

Bulldozers.
Scrapers.
Land levelers.
Graders.
Cotton ginning machinery.
Canning and packing equipment.

(4) Sales of junk.

(5) Sales of machinery or equipment which are sold "installed", where the installation involves construction work. Installations which require extensive planning, labor and use of specialized equipment ordinarily constitute construction work. In such cases the cost of installation ordinarily is substantial in relation to the cost of the goods installed.

(f) *Quantity sales to farmers.* It should be noted that the concept of fleet sales discussed in paragraphs (c)(3) and (5) of this section is not applied to sales to farmers, even though the farmer uses five or more vehicles on his farm.

(g) *Particular activities which lack a retail concept.* Any receipts derived from warehousing, construction, including water well drilling, or manufacturing activities performed by the automobile, truck, or farm implement dealer are not receipts from retail sales. These activities and the manufacturing of farm implements are not retail activities.

§ 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, trailers, farm implements, or aircraft. Section 13(b)(10) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) *Character of establishment and employees exempted.* (1) An establishment will qualify for this exemption if the following two tests are met:

(i) The establishment must not be engaged in manufacturing; and

(ii) The establishment must be primarily engaged in the business of selling automobiles, trailers, trucks, farm implements, or aircraft to the ultimate purchaser. If these tests are met by an establishment the exemption will be available for salesmen, partsmen, and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. An explanation of the term "employed by" is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership (H. Rept. No. 1366, 89th Cong., second session, page 42; Sen. Rept. No. 1487, 89th Cong., second session, page 32). However, the salesman, partsman, or mechanic, to qualify for exemption, must be "primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft." (H. Rept. No. 2004, 89th Cong., second session, pp. 7, 19.)

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships which qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in aircraft and trailers.

(c) *"Salesman, partsman, or mechanic."* (1) As used in section 13(b)(10), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, farm implement, or aircraft mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, trailer, truck, farm implement, or aircraft for its use and operation as such. This includes mechanical work required for safe operation, as a vehicle, farm implement, or aircraft. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for

repair service. A tow or wrecker truck driver or helper who performs nonmechanical repair work is not exempt. When employed by an establishment qualifying under section 13(b)(10) which sells and services trailers, mechanics primarily engaged in servicing the trailers for their use and operation as such may qualify for the exemption. "Trailers" include a wide variety of non-powered vehicles used for industrial, commercial, or personal transport or travel on the highways by attaching the vehicle to the rear of a separate powered vehicle. Mechanics servicing mobile homes for operation and use as a trailer, if and to the extent that they are operated as such on their own suspension systems would appear to be performing work within the purview of the exemption provided for mechanics in section 13(b)(10) to the same extent as mechanics servicing automobiles, ordinary travel, boat, or camping trailers, trucks, and truck or tractor trailers. On the other hand, there is no indication in the statutory language or the legislative history of any intent to provide exemption for mechanics whose work is directed to the habitability as a residence of a dwelling to be used as such on a fixed site in a particular locality, merely because the home is so designed that it may be moved to another location over the highways more readily than the traditional types of residential structures. Accordingly, servicemen checking, servicing, or repairing the plumbing, electrical, heating, air conditioning, or butane gas systems, the doors, windows, and other structural features of mobile homes to make them habitable or more habitable as residences are, while so engaged, not deemed to qualify as "mechanic(s) * * * servicing * * * trailers" within the meaning of section 13(b)(10). (Snell v. Quality Mobile Home Brokers, 424 F. 2d 233 (C.A. 4); Schultz v. Louisiana Trailer Sales, Inc. 428 F. 2d 61 (C.A. 5) certiorari denied, 400 U.S. 902.)

(4) Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves primarily engaged in the work of a salesman, partsman, or mechanic as described above are not exempt under section 13(b)(10). This is true despite the fact that such an employee's principal function may be diagnosing the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics.

(d) *Primarily engaged.* As used in section 13(b)(10), primarily engaged means the major part or over 50 percent of the salesman's, partsman's, or mechanic's time must be spent in selling or servicing the enumerated vehicles. As applied to the establishment, primarily engaged means that over half of the establishments annual dollar volume of sales made or business done must come from sales of the enumerated vehicles.

[35 FR 5856, Apr. 9, 1970, as amended at 38 FR 7549, Mar. 23, 1973]

OTHER ESTABLISHMENTS FOR WHICH SPECIAL EXCEPTIONS OR EXEMPTIONS ARE PROVIDED

§ 779.381 Establishments within special exceptions or exemptions.

(a) As stated in § 779.338, the special exceptions provided in the 1961 amendments for hotels, motels, restaurants, hospitals, institutions for the sick, the aged, the mentally ill or defective, and schools for physically or mentally handicapped or gifted children have been removed. Seasonally operated amusement or recreational establishments and motion picture theaters also no longer are specifically exempt under section 13(a)(2), but have specific exemptions set out for them in sections 13(a)(3) and 13(a)(9) of the Act as amended in 1966.

(b) Hotels, motels, and restaurants continue to be eligible for exemption under section 13(a)(2), but must meet all the requirements of that section for exemption in the same manner as other retail or service establishments. However, a special overtime exemption is provided for such establishments, regardless of size, in the first part of section 13(b)(8). Hospitals, residential care establishments, and schools for physically or mentally handicapped or gifted children are specifically excluded by the Act from consideration for exemption under section 13(a)(2); however, residential care establishments are exempt from the overtime pay requirements of the Act under the second part of section 13(b)(8) as long as overtime premium of not less than one and one-half times the employee's regular rate of pay is paid to him for time worked in excess of 48 hours in the workweek. In addition, section 7(j) of the amended Act provides a special overtime arrangement for hospital employees whereby overtime pay is due an employee after 8 hours in a day or 80 hours in a 14-day work period rather than on the basis of the 7-day workweek as is normally required by the Act. This provision, though, requires an agreement or understanding on the part of both the employer and the employee prior to the performance of the work. See § 778.601 of this chapter.

(c) The amendments of 1966 also repealed the exemption from both the minimum wage and overtime pay provisions which was in the Act for certain food service employees employed by retail or service establishments that were not exempt under section 13(a)(2). This exemption (formerly found in section 13(a) (20)) is now an exemption from the overtime provisions only and is set out in section 13(b)(18). Those establishments now excluded by the Act from consideration for exemption under section 13(a)(2) (hospitals, residential care establishments, etc.) may utilize this exemption where they meet the Act's definition of retail or service establishment in the last sentence of section 13(a)(2) and the conditions set out in section 13(b)(18). Likewise, the special exemption for any employee of a retail or service establishment primarily engaged in the business of selling automobiles, trucks, or farm implements was repealed by the 1966 amendments. In its stead the overtime exemption set out in section 13(b)(10) and previously discussed in § 779.372 was provided for certain employees of any nonmanufacturing establishment primarily engaged in the business of selling automobiles, trailers, trucks, farm implements, or aircraft to the ultimate consumer.

(d) A special exemption from the overtime pay requirements is also included in the amended Act for bowling establishments which do not meet the tests under section 13(a)(2) for exemption as a retail or service establishment. Section 13(b)(19) states that the overtime pay requirements of the Act shall not apply with respect to "any employee of a bowling establishment if such employee receives compensation for employment in excess of 48 hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed." Unlike the overtime pay exemption in section 13(b)(18), this exemption is not dependent upon the establishment meeting the definition of retail or service establishment.

HOTELS AND MOTELS

§ 779.382 May qualify as exempt 13(a)(2) establishments.

A hotel or motel establishment may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act. However, the establishment must meet all of the requirements of section 13(a)(2) (see § 779.337). In determining whether an establishment is a retail or service establishment within the meaning of section 13(a)(2) the dollar volume received from the leasing or rental of space to other than transient members of the general public cannot be counted as derived from retail sales of goods or services. Therefore, receipts from tenants who are not transient guests (see § 779.383(c)) must be included in the 25 percent tolerance provided for sales for resale or sales not recognized as retail.

§ 779.383 "Hotel" and "motel" exemptions under section 13(b)(8).

(a) *General.* A hotel or motel establishment may qualify for exemption from the Act's overtime pay requirements, even if it is in an enterprise described in section 3(s) and is not exempt under section 13(a)(2) because it exceeds the monetary test for exemption under that section. The first part of section 13(b)(8) provides that the overtime provisions of section 7 of the Act shall not apply with respect to "any employee employed by an establishment which is a hotel, motel * * *." The 13(b)(8) exemption is applicable irrespective of the annual dollar volume of sales of a hotel or motel establishment or of the enterprise of which it is a part.

(b) *Definition of "hotel".* The term "hotel" as used in section 13(b)(8) means an establishment known to the public as a hotel, which is primarily engaged in providing lodging or lodging and meals for the general public. Included are hotels operated by membership organizations and open to the general public and apartment hotels which provide accommodations for transients. However, an establishment whose income is primarily from providing a permanent place of residence or from providing residential facilities complete with bedrooms and kitchen for leased periods longer than 3 months would not be considered a hotel within the meaning of the Act. An apartment or residential hotel is not considered a hotel for purposes of section 13(b)(8) unless more than half of its annual dollar volume is derived from providing transient guests representative of the general public with lodging or lodging and meals. (See paragraph (c) of this section.) Establishments in which lodging accommodations are not available to the public are not included. Also excluded from the category of hotels are rooming and boarding houses, and private residences commonly known as tourist homes. Resort or other hotels even if they operate seasonally are regarded as hotel. (See Cong. Rec., August 25, 1966, pages 19729-19732; Cong Rec., August 26, 1966, pages 19907-19911.)

(c) *"Transient guests".* In determining who are "transient guests" within the meaning of § 779.382 and paragraph (b) of this section, as a general rule the Department of Labor would consider as transient a guest who is free to come and go as he pleases and who does not sojourn in the establishment for a specified time or permanently. A transient is one who is entertained from day to day without any express contract or lease and whose stay is indefinite although to suit his convenience it may extend for several weeks or a season.

(d) *Definition of "motel".* The term "motel" as used in section 13(b)(8) means an establishment which provides services similar to that of a "hotel" described in paragraph (b) of this section, but which caters mostly to the motoring public, providing it with motor car parking facilities either adjacent to the room or cabin rented or at some other easily accessible place. Included in the term "motel" are those establishments known to the public as motor hotels, motor lodges, motor courts, motor inns, tourist courts, tourist lodges and the like.

(e) *Hotel and motel establishments engaged in other activities.* The primary function of a hotel or motel is to provide lodging facilities to the public. In addition, most hotels or motels provide food for their guests and many sell alcoholic beverages. These establishments also may engage in some minor revenue producing activities; such as, the operation of valet services offering cleaning and laundering service for the garments of their guests, news stands, hobby shops, the renting out of their public rooms for meetings, lectures, dances, trade exhibits and weddings. The exception provided for "hotels" and "motels" in section 13(b)(8) will not be defeated simply because a "hotel" or a "motel" engages in all or some of these activities, if it is primarily engaged in providing lodging facilities, food and drink to the public.

MOTION PICTURE THEATERS

§ 779.384 May qualify as exempt establishments.

Section 13(a)(9) of the Act as amended in 1966 exempts from the minimum wage and overtime pay requirements "any employee employed by an establishment which is a motion picture theater." This exemption will be applicable irrespective of the annual dollar volume of sales of such establishment or of the enterprise of which it is a part. A motion picture theater may also qualify as an exempt retail or service establishment under section 13(a)(2) of the Act if the establishment meets all requirements of the exemption, discussed above in §§ 779.337 to 779.341. The term "motion picture theater" as used in section 13(a)(9) means a commercially operated theater primarily engaged in the exhibition of motion pictures with or without vaudeville presentations. It includes "drive-in motion picture theaters" commonly known as "open air" or "drive-in" theaters, but does not include such incidental exhibition of motion pictures as those offered to passengers on aircraft. "Legitimate theaters" primarily engaged in exhibiting stage productions are not "motion picture theaters."

SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS

§ 779.385 May qualify as exempt establishments.

An amusement or recreational establishment operating on a seasonal basis may qualify as an exempt establishment under section 13(a)(3) of the Act, added by the 1966 amendments, even if it does not meet all the requirements of the 13(a)(2) exemption. Section 13(a)(3) exempts from the minimum wage and overtime pay requirements of the Act "any employee employed by an establishment which is an amusement or recreational establishment, if (a) it does not operate for more than seven months in any calendar year or (b) during the preceding calendar year, its average receipts for any 6 months of the year were not more than 33 1/3 percentum of its average receipts for the other 6 months of such year". "Amusement or recreational establishments" as used in section 13(a)(3) are establishments frequented by the public for its amusement or recreation and which are open for 7 months or less a year or which meet the seasonal receipts test provided in clause (B) of the exemption. Typical examples of such are the concessionaires at amusement parks and beaches. (S. Rept. 145, 87th Cong., first session, p. 28; H. Rept. 75, 87th Cong., 1st Sess., p. 10.)

RESTAURANTS AND ESTABLISHMENTS PROVIDING FOOD AND BEVERAGE SERVICE

§ 779.386 Restaurants may qualify as exempt 13(a)(2) establishments.

(a) A restaurant may qualify as an exempt retail or service establishment under section 13(a)(2) of the Act. However, the establishment must meet all of the requirements of section 13(a)(2) (see § 779.337). It should be noted that a separate exemption from the overtime pay provisions of the Act only is provided in section 13(b)(18) for certain food service employees employed by establishments other than restaurants if the establishment meets the definition of a retail or service establishment as defined in the last sentence of section 13(a)(2). Privately owned and operated restaurants conducted as separate and independent business establishments in industrial plants, office buildings, government installations, hospitals, or colleges, such as were involved in McComb v. Factory Stores, 81 F. Supp. 403 (N.D. Ohio) continue to be exempt under section 13(a)(2) where the tests of the exemption are met (S. Rept. 145, 87th Cong., first session, p. 28; H. Rept. 75, 87th Cong., first session, p. 10). However, they would not be met if the food service is carried on as an activity of the larger, nonretail establishment in which the facility is located and there is no independent, separate and distinct place of business offering the restaurant service to individual customers from the general public, who purchase the meals selected by them directly from the establishment which serves them. An establishment serving meals to individuals, pursuant to a contract with an organization or person paying for such meals because the latter has assumed a contractual obligation to furnish them to the individuals concerned, is selling to such organization or firm, and the sales are for resale within the meaning of section 13(a)(2). See also § 779.387.

§ 779.387 "Restaurant" exemption under section 13(b) (8).

(a) As amended in 1966, the Act, in section 13(b) (8), exempts from its overtime pay provisions "any employee employed by an establishment which is a * * * restaurant". The term "restaurant" as used in section 13(b)(8) of the Act means an establishment which is primarily engaged in selling and serving to purchasers at retail prepared food and beverages for immediate consumption on the premises. This includes such establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, or tea rooms. The term "restaurant" does not include drinking establishments, such as bars or cocktail lounges, whose sales of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages. Certain food or beverage service employees of establishments such as bars and cocktail lounges, however, may be exempt under section 13(b)(18).

(b) Not all places where food is served for immediate consumption on the premises are "restaurant" establishments within the meaning of section 13(b)(8). Such service is sometimes provided as an incidental activity of an establishment of another kind, rather than by an establishment possessing the physical and functional characteristics of a separate place of business engaged in restaurant operations. In such event, the establishment providing the meal service is not an establishment "which is" a restaurant as section 13(b)(8) requires for exemption. Further, not every place which serves meals, even if it should qualify as a separate food service establishment, possesses the characteristics of a "restaurant." The meals served by restaurants are characteristically priced, offered, ordered, and served for consumption by and paid for by the customer on an individual meal basis. A restaurant functions principally, and not merely incidentally, to meet the immediate needs and desires of the individual customer for refreshment at the particular time that he visits the establishment for the purpose. A separate transaction to accommodate these needs and desires takes place on the occasion of each such visit. A "restaurant", therefore, is to be distinguished from an establishment offering meal service on a boarding or term basis or providing such service only as an incident to the operation of an enterprise of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for such operation. Accordingly, a boarding house is not a "restaurant" within the meaning of section 13(b)(8), nor are the dining facilities of a boarding school, college or university which serve its students and faculty, nor are the luncheon facilities provided for private and public day school students, nor are other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

§ 779.388 Exemption provided for food or beverage service employees.

(a) A special exemption is provided in section 13(b)(18) of the Act for certain food or beverage service employees of retail or service establishments. This section excludes from the overtime pay provisions in section 7 of the Act, "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs." This is an employee exemption, intended to apply to employees engaged in the named activities for such establishments as "drug stores, department stores, bowling alleys, and the like." (S. Rept. No. 1487, 89th Cong., second session, p. 32.)

(b) The 13(b)(18) exemption will apply only if the following two tests are met:

(1) The employee must be an employee of a retail or service establishment (as defined in section 13(a)(2) of the Act); and

(2) The employee must be employed primarily in connection with the specified food or beverage service activities.

If both of the above criteria are met, the employee is exempt from the overtime pay provisions of the Act.

(c) The establishment by which the employee is employed must be a "retail or service establishment." This term is defined in section 13(a)(2) of the Act and the definition is quoted in § 779.24; the application of the definition is considered at length earlier in this subpart. In accordance with this definition, the establishment will be a "retail or service establishment" for purposes of section 13(b)(18) if 75 percent or more of the establishment's annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

(d) If the establishment comes within the above definition it is immaterial that the establishment is in an enterprise or part of an enterprise described in section 3(s). Thus section 13(b)(18) will be applicable regardless of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part. It should also be noted that it is not required that the establishment make more than 50 percent of its annual dollar volume of sales within the State in which it is located. The establishment by which the employee is employed, provided it qualifies as a "retail or service establishment," may be a drug store, department store, cocktail lounge, night club, and the like.

(e) This exemption does not apply to employees of the ordinary bakery or grocery store who handle, prepare or sell food or beverages for human consumption since such food or beverages are not prepared or offered for consumption "on the premises, or by such services as catering, banquet, box lunch, or curb or counter service * * *."

(f) If the establishment by which the employee is employed is a "retail or service establishment," as explained above, he will be exempt under section 13(b)(18) provided he is employed primarily in connection with the preparation or offering of food or beverages for human consumption either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs. An employee employed in the actual preparation or serving of the food or beverages or in activities closely related and directly essential to the preparation and serving will be regarded as engaged in the described activities. The exemption, therefore, extends not only to employees actually cooking, packaging or serving food or beverages, but also to employees such as cashiers, hostesses, dishwashers, busboys, and cleanup men. Also, where the food or beverages are served away from the establishment, the exemption extends to employees of the retail or service establishment who make ready the serving place, serve the food, clean up, and transport the equipment, food and beverages to and from the serving place.

(g) For the exemption to apply, the employee must be engaged "primarily" in performing the described activities. A sales clerk in a drug store, department store or other establishment, who as an incident to his other duties, occasionally prepares or otherwise handles food or beverages for human consumption on the premises will not come within the scope of this exemption. The exemption is intended for employees who devote all or most of their time to the described food or beverage service activities. For administrative purposes this exemption will not be considered defeated for an employee in any workweek in which he devotes more than one-half of his time worked to such activities.

Subpart E—Provisions Relating to Certain Employees of Retail or Service Establishments

GENERAL PRINCIPLES

§ 779.400 Purpose of subpart.

The 1966 amendments to the Act changed certain existing provisions and added other provisions pertaining to exemptions from the requirements of sections 6 and 7 with respect to certain employees. This subpart deals with those exemptions provisions of interest to retail or service enterprises or establishments.

EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

§ 779.401 Statutory provision.

Section 13(a)(1) of the Act provides that the provisions of sections 6 and 7 shall not apply with respect to:

> Any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

§ 779.402 "Executive" and "administrative" employees defined.

The terms "executive" and "administrative" as used in section 13(a)(1) of the Act are defined and delimited in Subpart A of Part 541 of this chapter and explained in Subpart B of that part. These regulations are applicable under the amended section 13(a)(1) in determining which employees are bona fide executive or administrative employees. The clause that is enclosed in parentheses in section 13(a)(1) and which reads "including any employee employed in the capacity of academic administrative personnel for teacher in elementary or secondary schools" was added by the 1966 amendments to the Act. This clause will not have any affect in the application of the regulations to retail or service establishments. The Act and the regulations point out the fact that an executive or administrative employee of a retail or service establishment may devote up to 40 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative activities and still qualify as a bona fide executive or administrative employee. However, in other types of establishments such a tolerance is limited to 20 percent, except where special provisions are made in Part 541 of this chapter.

§ 779.403 Administrative and executive employees in covered enterprises employed in other than retail or service establishments.

The up-to-40 percent tolerance for nonexecutive or nonadministrative duties discussed in the preceding section, does not apply to executive or administrative employees of an establishment other than a "retail or service establishment." For example, an executive or administrative employee of a central office or a central warehouse of a chain store system is not an employee of a "retail or service establishment," and therefore must still devote not more than 20 percent of his hours worked in a workweek to activities which are not directly and closely related to the performance of executive or administrative duties in order to qualify as a bona fide executive or administrative employee under section 13(a)(1), except where special provisions are made in the regulations issued under that section of the Act.

§ 779.404 Other section 13(a)(1) employees employed in covered enterprises.

The "professional" employee or the "outside salesman" employed by a retail or service establishment in a covered enterprise, in order to qualify as a bona fide "professional employee" or as an "outside salesman," must meet all the requirements set forth in the regulations issued and found in Part 541, Subpart A of this chapter, and further explained in Subpart B thereof. The up-to-40 percent tolerance discussed in § 779.403 for "administrative and executive employees" of a retail or service establishment does not apply to the "professional employee" or the "outside salesman."

BEST DOCUMENT AVAILABLE

STUDENTS, LEARNERS, AND HANDICAPPED WORKERS

§ 779.405 Statutory provisions.

Section 13(a)(7) of the Act provides that the provisions of sections 6 and 7 shall not apply to:

> Any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 14.

Section 14 of the Act provides, in pertinent part, as follows:

> LEARNERS, APPRENTICES, STUDENTS, AND HANDICAPPED WORKERS
>
> SEC. 14. (a) The Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.
>
> (b) The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment of full-time students, regardless of age but in compliance with applicable child labor laws, on a part-time basis in retail or service establishments (not to exceed twenty hours in any workweek) or on a part-time or a full-time basis in such establishments during school vacations, under special certificates issued pursuant to regulations of the Secretary, at a wage rate not less than 85 per centum of the minimum wage applicable under section 6, except that the proportion of student hours of employment to total hours of employment of all employees in any establishment may not exceed (1) such proportion for the corresponding month of the 12-month period preceding May 1, 1961, (2) in the case of a retail or service establishment whose employees (other than employees engaged in commerce or in the production of goods for commerce) are covered by this Act for the first time on or after the effective date of the Fair Labor Standards Amendments of 1966, such proportion for the corresponding month of the 12-month period immediately prior to such date, or (3) in the case of a retail or service establishment coming into existence after May 1, 1961, or a retail or service establishment for which records of student hours worked are not available, a proportion of student hours of employment to total hours of employment of all employees based on the practice during the 12-month period preceding May 1, 1961, in (A) similar establishments of the same employer in the same general metropolitan area in which the new establishment is located, (B) similar establishments of the same employer in the same or nearby counties if the new establishment is not in a metropolitan area, or (C) other establishments of the same general character operating in the community or the nearest comparable community. Before the Secretary may issue a certificate under this subsection he must find that such employment will not create a substantial probability of reducing the full-time employment opportunities of persons other than those employed under this subsection.
>
> * * * * *
>
> (d)(1) Except as otherwise provided in paragraphs (2) and (3) of this subsection, the Secretary of Labor, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment under special certificates of individuals * * * whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under section 6 of this Act but not less than 50 per centum of such wage and which are commensurate with those paid nonhandicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work.
>
> (2) The Secretary, pursuant to such regulations as he shall prescribe and upon certification of the State agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates for the employment of—
>
> (A) handicapped workers engaged in work which is incidental to training or evaluation programs, and
>
> (B) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment,
>
> at wages which are less than those required by this subsection and which are related to the worker's productivity.
>
> (3)(A) The Secretary may by regulation or order provide for the employment of handicapped clients in work activities centers under special certificates at wages which are less than the minimums applicable under section 6 of this Act or prescribed by paragraph (1) of this subsection and which constitute equitable compensation for such clients in work activities centers.
>
> (B) For purposes of this section, the term "work activities centers" shall mean centers planned and designed exclusively to provide

therapeutic activities for handicapped clients whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

§ 779.406 "Student-learners".

(a) *Applicable regulations.* In accordance with section 14 of the Act regulations have been issued to provide for employment under special certificates of student-learners at wages lower than the minimum wage applicable under section 6 of the Act. These regulations are set forth in Part 520 of this chapter and govern the issuance of special certificates for student-learners in covered employments generally as well as such employments in retail or service establishments.

(b) *Definitions.* The regulations in § 520.2 of this chapter define "student-learners" and "bona fide vocational training program" as follows:

(1) A "student-learner" is defined as "a student who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a bona fide vocational training program."

(2) A "bona fide vocational training program" is defined as "one authorized and approved by a State board of vocational education or other recognized educational body and provides for part-time employment training which may be scheduled for a part of the workday or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related industrial information given as a regular part of the student-learner's course by an accredited school, college or university."

§ 779.407 Learners other than "student-learners".

Regulations have been issued in accordance with the authority in section 14 of the Act to provide for employment under special certificates of learners at wages lower than the minimum wage applicable under section 6 of the Act. Part 522 of this chapter contains the general regulations for learners and those for learners in particular industries. General learner regulations are set forth in §§ 522.1 to 522.11 of this chapter.

§ 779.408 "Full-time students".

The 1961 Amendments added to section 14 of the Act, the authority to issue special certificates for the employment of "full-time students," under certain specified conditions, at wages lower than the minimum wage applicable under section 6. The student, to qualify for a special certificate must attend school full time and his employment must be outside of his school hours and his employment must be in a retail or service establishment. In addition, the student's employment must not be of the type ordinarily given to a full-time employee. "The purpose of this provision," as made clear in the legislative history, "is to provide employment opportunities for students who desire to work part time outside of their school hours without the displacement of adult workers" (S. Rept. 145, 87th Cong., first session, p. 29). The application of this provision was amplified by the 1966 Amendments to provide for the employment of full-time students regardless of age but in compliance with applicable child labor laws in retail or service establishments and in agriculture (not to exceed 20 hours in any workweek) or on a part-time or a full-time basis during school vacations at a wage rate not less than 85 percent of the applicable minimum wage (H. Rept. 1366, 89th Cong., second session, pp. 34 and 35). Regulations authorizing the issuance of certificates under this provision of the Act are published in Part 519 of this chapter.

§ 779.409 Handicapped workers.

Regulations have been issued under the authority in section 14 of the Act to provide for employment under special certificate of handicapped workers at wages lower than the minimum wage applicable under section 6 of the Act. These regulations are set forth in Part 524 of this chapter. In these regulations handicapped workers are defined as individuals whose earning capacity is impaired by age or physical or mental deficiency or injury for the work they are to perform.

EMPLOYEES COMPENSATED PRINCIPALLY BY COMMISSIONS

§ 779.410 Statutory provision.

Section 7 of the Act provides, in subsection (i):

> (i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than 1 month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

There are briefly set forth in §§ 779.411 to 779.421 some guiding principles for determining whether an employee's employment and compensation meet the conditions set forth in section 7(i).

§ 779.411 Employee of a "retail or service establishment".

In order for an employee to come within the exemption from the overtime pay requirement provided by section 7(i) for certain employees receiving commissions, the employee must be employed by a retail or service establishment. The term "retail or service establishment" is defined in section 13(a)(2) of the Act. The definition is set forth in § 779.24; its application is considered at length in Subpart D of this part. As used in section 7(i), as in other provisions of the Act, the term "retail or service establishment" means an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

§ 779.412 Compensation requirements for overtime pay exemption under section 7(i).

An employee of a "retail or service establishment" who is paid on a commission basis or whose pay includes compensation representing commissions need not be paid the premium compensation prescribed by section 7(a) for overtime hours worked in a workweek, provided the following conditions are met:

(a) The "regular rate" of pay of such employee must be more than one and one-half times the minimum hourly rate applicable to him under section 6, and

(b) More than half his compensation for a "representative period" (not less than one month) must represent commissions on goods or services.

§ 779.413 Methods of compensation of retail store employees.

(a) Retail or service establishment employees are generally compensated (apart from any extra payments for overtime or other additional payments) by one of the following methods:

(1) Straight salary or hourly rate: Under this method of compensation the employee receives a stipulated sum paid weekly, biweekly, semimonthly, or monthly or a fixed amount for each hour of work.

(2) Salary plus commission: Under this method of compensation the employee receives a commission on all sales in addition to a base salary (see paragraph (a)(1) of this section).

(3) Quota bonus: This method of compensation is similar to paragraph (a)(2) of this section except that the commission payment is paid on sales over and above a predetermined sales quota.

(4) Straight commission without advances: Under this method of compensation the employee is paid a flat percentage on each dollar of sales he makes.

(5) Straight commission with "advances," "guarantees," or "draws." This method of compensation is similar to paragraph (a)(4) of this section except that the employee is paid a fixed weekly, biweekly, semimonthly, or monthly "advance," "guarantee," or "draw." At periodic intervals a settlement is made at which time the payments already made are supplemented by any additional amount by which

his commission earnings exceed the amounts previously paid.

(b) The above listing in paragraph (a) of this section which reflects the typical methods of compensation is not, of course, exhaustive of the pay practices which may exist in retail or service establishments. Although typically in retail or service establishments commission payments are keyed to sales, the requirement of the exemption is that more than half the employee's compensation represent commissions "on goods or services," which would include all types of commissions customarily based on the goods or services which the establishment sells, and not exclusively those measured by "sales" of these goods or services.

§ 779.414 Types of employment in which this overtime pay exemption may apply.

Section 7(i) was enacted to relieve an employer from the obligation of paying overtime compensation to certain employees of a retail or service establishment paid wholly or in greater part on the basis of commissions. These employees are generally employed in so-called "big ticket" departments and those establishments or parts of establishments where commission methods of payment traditionally have been used, typically those dealing in furniture, bedding and home furnishings, floor covering, draperies, major appliances, musical instruments, radios and television, men's clothing, women's ready to wear, shoes, corsets, home insulation, and various home custom orders. There may be other segments in retailing where the proportionate amount of commission payments would be great enough for employees employed in such segments to come within the exemption. Each such situation will be examined, where exemption is claimed, to make certain the employees treated as exempt from overtime compensation under section 7(i) are properly within the statutory exclusion.

§ 779.415 Computing employee's compensation for the representative period.

(a) In determining for purposes of section 7(i) whether more than half of an employee's compensation "represents commissions on goods or services" it is necessary first to total all compensation paid to or on behalf of the employee as remuneration for his employment during the period. All such compensation in whatever form or by whatever method paid should be included, whether calculated on a time, piece, incentive or other basis, and amounts representing any board, lodging or other facilities furnished should be included in addition to cash payments, to the extent required by section 3(m) of the Act and Part 531 of this chapter. Payments excludable from the employee's "regular rate" under section 7(e) may be excluded from this computation if, but only if, they are payments of a kind not made as compensation for his employment during the period. (See Part 778 of this chapter.)

(b) In computing the employee's total compensation for the representative period it will in many instances become clear whether more than half of it represents commissions. Where this is not clear, it will be necessary to identify and total all portions of the compensation which represent commissions on the goods or services that the retail or service establishment sells. In determining what compensation "represents commissions on goods or services" it is clear that any portion of the compensation paid, as a weekly, biweekly, semimonthly, monthly, or other periodic salary, or as an hourly or daily rate of pay, does not "represent commissions" paid to the employee. On the other hand, it is equally clear that an employee paid entirely by commissions on the goods or services which the retail or service establishment sells will, in any representative period which may be chosen, satisfy the requirement that more than half of his compensation represents commissions. The same will be true of an employee receiving both salary and commission payments whose commissions always exceed the salary. If, on the other hand, the commissions paid to an employee receiving a salary are always a minor part of his total compensation it is clear that he will not qualify for the exemption provided by section 7(i).

§ 779.416 What compensation "represents commissions."

(a) Employment arrangements which provide for a commission on goods or services to be paid to an employee of a retail or service establishment may also provide, as indicated in § 779.413, for the payment to the employee at a regular pay period of a fixed sum of money, which may bear a more or less fixed relationship to the commission earnings which could be expected, on the basis of experience, for an average period of the same length. Such periodic payments, which are variously described in retail or service establishments as "advances," "draws," or "guarantees," are keyed to a time base and are usually paid at weekly or other fixed intervals which may in some instances be different from and more frequent than, the intervals for payment of any earnings computed exclusively on a commission basis. They are normally smaller in amount than the commission earnings expected for such a period and if they prove to be greater, a deduction of the excess amount from commission earnings for a subsequent period, if otherwise lawful, may or may not be customary under the employment arrangement. A determination of whether or to what extent such periodic payments can be considered to represent commissions may be required in those situations where the employment arrangement is that the employee will be paid the stipulated sum, or the commission earnings allocable to the same period, whichever is the greater amount. The stipulated sum can never represent commissions, of course, if it is actually paid as a salary. If, however, it appears from all the facts and circumstances of the employment that the stipulated sum is not so paid and that it actually functions as an integral part of a true commission basis of payment, then such compensation may qualify as compensation which "represents commissions on goods or services" within the meaning of clause (2) of the section 7(i) exemption.

(b) The express statutory language of section 7(i), as amended in 1966, provides that "In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee" which may be paid to the employee. Thus an employee who is paid a guarantee or draw against commissions computed in accordance with a bona fide commission payment plan or formula under which the computed commissions vary in accordance with the employee's performance on the job will qualify for exemption provided the conditions of 7(i)(1) are met as explained in § 779.419. Under a bona fide commission plan all of the computed commissions will be counted as compensation representing commissions even though the amount of commissions may not equal or exceed the guarantee or draw in some workweeks. The exemption will also apply in the case of an employee who is paid a fixed salary plus an additional amount of earned commissions if the amount of commission payments exceeds the total amount of salary payments for the representative period.

(c) A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case where the computed commissions seldom or never equal or exceed the amount of the draw or guarantee). Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment consituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.

§ 779.417 The "representative period" for testing employee's compensation.

(a) Whether compensation representing commissions constitutes most of an employee's pay, so as to satisfy the exemption condition contained in clause (2) or section 7(i), must be determined by testing the employee's compensation for a "representative period" of not less than 1 month. The Act does not define a representative period, but plainly contemplates a period which can reasonably be accepted by the employer, the employee, and disinterested persons as being truly representative of the compensation aspects of the employee's employment on which this exemption test depends. A representative period within the meaning of this exemption may be described generally as a period which typifies the total characteristics of an employee's earning pattern in his current employment situation, with respect to the fluctuations of the proportion of his commission earnings to his total compensation.

(b) To this end the period must be as recent a period, of sufficient length (see paragraph (c) of this section) to fully and fairly reflect all such factors, as can practicably be used. Thus, as a general rule, if a month is long enough to reflect the necessary factors, the most recent month for which necessary computations can be made prior to the payday for the first workweek in the current month should be chosen. Similarly, if it is necessary to use a period as long as a calendar or fiscal quarter year to fully represent such factors, the quarterly period used should ordinarily be the one ending immediately prior to the quarter in which the current workweek falls. If a period longer than a quarter year is required in order to include all the factors necessary to make it fully and fairly representative of the current period of employment for purposes of section 7(i), the end of such period should likewise be at least as recent as the end of the quarter year immediately preceding the quarter in which the current workweek falls. Thus, in the case of a representative period of 6 months or of 1 year, recomputation each quarter would be required so as to include in it the most recent two quarter-years or four quarter-years, as the case may be. The quarterly recomputation would tend to insure that the period used reflects any gradual changes in the characteristics of the employment which could be important in determining the ratio between compensation representing commissions and other compensation in the current employment situation of the employee.

(c) The representative period for determining whether more than half of an employee's compensation represents commissions cannot, under the express terms of section 7(i), be less than 1 month. The period chosen should be long enough to stabilize the measure of the balance between the portions of the employee's compensation which respectively represent commissions and other earnings, against purely seasonal or plainly temporary changes. Although the Act sets no upper limit on the length of the period, the statutory intent would not appear to be served by any recognition of a period in excess of 1 year as representative for purposes of this exemption. There would seem to be no employment situation in a retail or service establishment in which a period longer than a year would be needed to represent the seasonal and other fluctuations in commission compensation.

(d) Accordingly, for each employee whose exemption is to be tested in any workweek under clause (2) of section 7(i), an appropriate representative period or a formula for establishing such a period must be chosen and must be designated and substantiated in the employer's records (see § 516.16 of this chapter). When the facts change so that the designated period or the period established by the designated formula is no longer representative, a new representative period or formula therefor must be adopted which is appropriate and sufficient for the purpose, and designated and substantiated in the employer's records. Although the period selected and designated must be one which is representative with respect to the particular employee for whom exemption is sought, and the appropriateness of the representative period for that employee will always depend on his individual earning pattern, there may be situations in which the factors affecting the proportionate relationship between total compensation and compensation representing commissions will be substantially identical for a group or groups of employees in a particular occupation or department of a retail or service establishment or in the establishment as a whole. Where this can be demonstrated to be a fact, and is substantiated by pertinent information in the employer's records, the same representative period or formula for establishing such a period may properly be used for each of the similarly situated employees in the group.

§ 779.418 Grace period for computing portion of compensation representing commissions.

Where it is not practicably possible for the employer to compute the commission earnings of the employee for all workweeks ending in a prior representative period in time to determine the overtime pay obligations, if any, for the workweek or workweeks immediately following, 1 month of grace may be used by the retail or service establishment. This month of grace will not change the length of the current period in which the prior period is used as representative. It will merely allow an interval of 1 month between the end of the prior period and the beginning of the current period in order to permit necessary computations for the prior period to be made. For example, assume that the representative period used is the quarter-year immediately preceding the current quarter, and commissions for the prior period cannot be computed in time to determine the overtime pay obligations for the workweeks included in the first pay period in the current quarter. By applying a month of grace, the next earlier quarterly period may be used during the first month of the current quarter; and the quarter-year immediately preceding the current quarter will then be used for all workweeks ending in a quarter-year period which begins 1 month after the commencement of the current quarter. Thus, a January 1-March 31 representative period may be used for purposes of section 7(i) in a quarterly period beginning May 1 and ending July 31, allowing the month of April for necessary commission computations for the representative period. Once this method of computation is adopted it must be used for each successive period in like manner. The prior period used as representative must, of course, as in other cases, meet all the requirements of a representative period as previously explained.

§ 779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's "regular rate" of pay.

(a) If more than half of the compensation of an employee of a retail or service establishment for a representative period as previously explained represents commissions on goods or services, one additional condition must be met in order for the employee to be exempt under section 7(i) from the overtime pay requirement of section 7(a) of the Act in a workweek when his hours of work exceed the maximum number specified in section (a). This additional condition is that his "regular rate" of pay for such workweek must be more than one and one-half times the minimum hourly rate applicable to him from the minimum wage provisions of section 6 of the Act. If it is not more than one and one-half times such minimum rate, there is no overtime pay exemption for the employee in that particular workweek.

(b) The meaning of the "regular rate" of pay under the Act is well established. As explained by the Supreme Court of the United States, it is "the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed" and "by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments." (Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419.) It is a rate per hour, computed for the particular workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate (Overnight Motor Co. v. Missel, 316

U.S. 572). By definition (Act, section 7(e), the "regular rate" as used in section 7 of the Act includes "all remuneration paid to, or on behalf of, the employee" except payments expressly excluded by the seven numbered clauses of section 7(e). The computation of the regular rate for purposes of the Act is explained in Part 778 of this chapter. The "regular rate" is not synonymous with the "basic rate" which may be established by agreement or understanding of the parties to the employment agreement under the provisions of section 7(g)(3) of the Act; that section, like section 7(i), merely provides an exemption from the general requirement of overtime compensation based on the regular rate contained in section 7(a), if certain prescribed conditions are met (in section 7(g)(3) these include payment of overtime compensation on a basic rate established and authorized in accordance with its terms). The requirement of section 7(i) with respect to the "regular rate" of pay of an employee who may come within the exemption which it provides is a simple one: "the regular rate of pay of such employee," when employed "for a workweek in excess of the applicable workweek specified" in section 7(a), must be "in excess of one and one-half times the minimum hourly rate applicable to him under section 6." The employee's "regular rate" of pay must be computed, in accordance with the principles discussed above, on the basis of his hours of work in that particular workweek and the employee's compensation attributable to such hours. The hourly rate thus obtained must be compared with the applicable minimum rate of pay of the particular employee under the provisions of section 6 of the Act. If the latter rate is $1.60 an hour, for example, then the employee's regular rate must be *more* than $2.40 an hour if the exemption is to apply.

§ 779.420 Recordkeeping requirements.

The records which must be kept with respect to employees for whom the overtime pay exemption under section 7(i) is taken are specified in § 516.16 of this chapter.

§ 779.421 Basic rate for computing overtime compensation of nonexempt employees receiving commissions.

The overtime compensation due employees of a retail or service establishment who do not meet the exemption requirements of section 7(i) may be computed under the provisions of section 7(g)(3) of the Act if the employer and employee agree to do so under the conditions there provided. Section 7(g)(3) permits the use of a basic rate established, pursuant to agreement or understanding in advance of the work, in lieu of the regular rate for the purpose of computing overtime compensation. The use of such a basic rate for employees of a retail or service establishment compensated wholly or partly by commissions is authorized under the conditions set forth in Part 548 of this chapter.

Subpart F—Other Provisions Which May Affect Retail Enterprises

GENERAL

§ 779.500 Purpose of subpart.

In Subpart A of this part, reference was made to a number of regulations which discuss provisions of the Act, such as general coverage, overtime compensation, joint employment, hours worked, and methods of payment of wages, which are applicable to others as well as to retailers and their employees. (See § 779.6.) In addition to those provisions, the act contains other provisions of interest to retailers and their employees. It is the purpose of this subpart to focus attention on several of the more significant provisions in these categories.

EQUAL PAY PROVISIONS

§ 779.501 Statutory provisions.

Section 6(d) of the Act provides:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal

work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Official interpretations of the Department of Labor with respect to the provisions of section 6(d) are found in Part 800 of this chapter.

CHILD LABOR PROVISIONS

§ 779.502 Statutory provisions; regulations in Part 1500 of this title.

(a) The Act's prohibitions in relation to employment of child labor, which may have application to retailers, are found in section 12(a) and section 12(c). Section 12(a) reads as follows:

> No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

Section 12(c) provides:

> No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

(b) "Oppressive child labor" is defined by the Act, for purposes of the foregoing provisions, in the language set forth in § 779.505.

(c) Sections 570.1 to 570.129 of this chapter contain applicable regulations and a detailed discussion of the child labor provisions of the Act. Although those sections offer guidance for all including retailers, there are set forth in §§ 779.503 through 779.508 pertinent provisions and a brief discussion of the standards which are of particular interest to those in the retail field.

§ 779.503 The retailer and section 12(a).

Section 12(a) prohibits certain shipments or deliveries for shipment by "producers," "manufacturers" "or dealers." These terms having appeared in this section prior to the 1961 amendments are defined and described in § 570.105 of this chapter, and said definitions remain unchanged. It should be noted that the term "manufacturer" as used in section 12(a) includes retailers who, in addition to retail selling, engage in such manufacturing activities as the making of slipcovers or curtains, the baking of bread, the making of candy, or the making of window frames. Further, the term "dealers" refers to anyone who deals in goods including persons engaged in buying, selling, trading, distributing, delivering, etc. "Dealers," therefore, as used in section 12(a) include retailers. Therefore, where a retailer's business unit is covered under the Act and he is a producer, manufacturer or dealer within the meaning of this section, the retailer must comply with the requirements of section 12(a).

If a retailer's business unit which is covered under the Act is exempt as a retail or service establishment under section 13 of the Act from the monetary requirements of the Act, the requirements of the child labor provisions must still be met. Thus, retail or service establishments, in covered enterprises, doing less than $250,000 annually, must comply with the child labor requirements even if they are exempt from minimum wage and overtime provisions under section 13(a)(2) of the Act.

§ 779.504 The retailer and section 12(c).

Section 12(c) was amended in 1961 to prohibit the employment of oppressive child labor in any enterprise engaged in commerce or in the production of goods for commerce. Thus, employers in every enterprise which is covered under the Act must comply with section 12(c) of the child labor provisions of the Act. As stated in § 779.503, compliance with this provision is necessary even though the employers in a particular establishment or establishments of a covered enterprise are exempt from the requirement of compensating employees in accordance with sections 6 and 7 of the Act.

§ 779.505 "Oppressive child labor" defined.

Section 3(1) of the Act defines oppressive child labor as follows:

> "Oppressive child labor" means a condition of employment under which (1) any employee under the age of 16 years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of 16 years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of 16 and 18 years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of 16 and 18 years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of 14 and 16 years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

§ 779.506 Sixteen-year minimum.

The Act sets a 16-year minimum for employment in manufacturing or mining occupations. Furthermore, this age minimum is applicable to employment in all other occupations unless otherwise provided by regulation or order issued by the Secretary.

§ 779.507 Fourteen-year minimum.

(a) *Prohibited occupations.* With respect to employment in occupations other than manufacturing and mining, the Secretary is authorized to issue regulations or orders lowering the age minimum to 14 years where he finds that such employment is confined to periods which will not interfere with the minors' schooling and to conditions which will not interfere with their health and well-being. Pursuant to this authority, the Secretary permits the employment of 14- and 15-year-old children in a limited number of occupations where the work is performed outside school hours and is confined to other specified limits. Under the provisions of Child Labor Regulations, Subpart C (§§ 570.31 through 570.38 of this chapter), employment of minors in this age group is not permitted in the following occupations:

(1) Manufacturing, mining, or processing occupations including occupations requiring the performance of any duties in a workroom or workplace where goods are manufactured, mined, or otherwise processed;

(2) Occupations involving the operation or tending of hoisting apparatus or of any power-driven machinery other than office machines;

(3) The operation of motor vehicles or service as helpers on such vehicles;

(4) Public messenger service;

(5) Occupations declared to be particularly hazardous or detrimental to health or well-being by the Secretary;

(6) Occupations in connection with (i) transportation of persons or property by rail, highway, air, water, pipeline, or other means; (ii) warehousing and storage; (iii) communications and public utilities; and (iv) construction (including demolition and repair). Office and sales work performed in connection with the occupations specified in this subparagraph is permitted if such work is not performed on trains or any other media of transportation or at the actual site of construction operations.

(b) *Permissible occupations; conditions.* Employment of 14- and 15-year-olds in all occupations other than those in paragraph (a) of this section is permitted by the regulation under certain conditions specified in the regulation. The permissible occupations for minors between 14 and 16 years of age in retail, food service, and gasoline service establishments are listed in § 570.34. The periods and conditions of employment for such minors are set out in § 570.35.

§ 779.508 Eighteen-year minimum.

To protect young workers from hazardous employment, the Act provides for a minimum age of 18 years in occupations found and declared by the Secretary to be particularly hazardous or detrimental to health or well-being of minors 16 and 17 years of age. These occupations may be found in §§ 570.51 through 570.68 of this chapter. Of particular interest to retailers are §§ 570.52, 570.58, 570.62 and 570.63 of this chapter pertaining to the occupations of motor-vehicle driver and outside helper, and occupations involving the operation of power-driven hoisting apparatus, bakery machines, and paper products machines.

DRIVER OR DRIVER'S HELPER MAKING LOCAL DELIVERIES

§ 779.509 Statutory provision.

Section 13(b)(11) exempts from the provisions of section 7 of the Act:

> Any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a).

This is an exemption from the overtime pay requirements only.

§ 779.510 Conditions that must be met for section 13(b)(11) exemption.

In order that an employee be exempt from the overtime provisions of the Act under section 13(b)(11) he must be employed as a driver or driver's helper making local deliveries, and, he must be compensated for such employment on a trip rate basis or other delivery payment plan, and such plan must be found by the Secretary to have the general purpose and effect of reducing the hours worked by the driver or driver's helper to, or below, the maximum workweek applicable to him under section 7(a) of the Act. If all the preceding conditions are not met the exemption is inapplicable.

§ 779.511 "Finding by Secretary."

As stated in § 779.510, before the section 13(b)(11) exemption may be claimed, the Secretary must find that the trip rate basis of compensation, or other delivery payment plan used to compensate a driver or a driver's helper making local deliveries, has the general purpose and effect of reducing the hours worked by these employees to, or below, the maximum workweek applicable to them under section 7(a) of the Act. The conditions under which such findings may be made, amended, or revoked, and the procedure for obtaining such a finding are set forth in the regulations in Part 551 of this chapter.

RECORDS TO BE KEPT BY EMPLOYERS

§ 779.512 The recordkeeping regulations.

Every employer who is subject to any of the provisions of the Act is required to maintain certain records. The recordkeeping requirements are set forth in regulations which have been published in Subparts A and B of Part 516 of this chapter. Subpart A contains the requirements applicable to all employers employing covered employees, including the general requirements relating to the posting of notices, the preservation and location of records and similar general provisions. Subpart A also contains the requirements relating to the records which must be kept for exempt executive, administrative, and professional employees and outside salesmen. Subpart B deals with information and data which must be kept with respect to employees who are subject to other exemptions and provisions of the Act.

§ 779.513 Order and form of records.

No particular order or form of records is prescribed by the regulations. However, the records which the employer keeps must contain the information and data required by the specific sections of the regulations which are applicable. In addition, where the employer claims an exemption from the minimum wage or overtime or other requirements of the Act, he should also maintain those records which serve to support his claim for exemption, such as records of sales, purchases, and receipts.

§ 779.514 Period for preserving records.

Basic records, such as payroll records, certificates issued or required under the Act, and employment agreements and other basic records must be preserved for at least 3 years. Supplementary records such as time and earnings cards or sheets, wage rate tables, work time schedules, or order, shipping and billing records, and similar records need be preserved for only 2 years.

§ 779.515 Regulations should be consulted.

This discussion in Subpart F of this part is intended only to indicate the general requirements of the recordkeeping regulations. Each employer subject to any provision of the Act should consult the regulations to determine what records he must maintain and the period for which they must be preserved.

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

Subpart A—Introductory

Sec.

780.0 Purpose of interpretative bulletins in this part.
780.1 General scope of the Act.
780.2 Exemptions from Act's requirements.
780.3 Exemptions discussed in this part.
780.4 Matters not discussed in this part.
780.5 Significance of official interpretations.
780.6 Basic support for interpretations.
780.7 Reliance on interpretations.
780.8 Interpretations made, continued, and superseded by this part.
780.9 Related exemptions are interpreted together.
780.10 Workweek standard in applying exemptions.
780.11 Exempt and nonexempt work during the same workweek.
780.12 Work exempt under another section of the Act.

Subpart B—General Scope of Agriculture

INTRODUCTORY

780.100 Scope and significance of interpretative bulletin.
780.101 Matters discussed in this subpart.
780.102 Pay requirements for agricultural employees.
780.103 "Agriculture" as defined by the Act.
780.104 How modern specialization affects the scope of agriculture.
780.105 "Primary" and "secondary" agriculture under section 3(f).

EXEMPTION FOR "PRIMARY" AGRICULTURE GENERALLY

780.106 Employment in "primary" agriculture is farming regardless of why or where work is performed.

FARMING IN ALL ITS BRANCHES

780.107 Scope of the statutory term.
780.108 Listed activities.
780.109 Determination of whether unlisted activities are "farming."

CULTIVATION AND TILLAGE OF THE SOIL

780.110 Operations included in "cultivation and tillage of the soil."

BEST DOCUMENT AVAILABLE

DAIRYING

Sec
780.111 "Dairying" as a farming operation.

AGRICULTURAL OR HORTICULTURAL COMMODITIES

780.112 General meaning of "agricultural or horticultural commodities."
780.113 Seeds, spawn, etc.
780.114 Wild commodities.
780.115 Forest products.
780.116 Commodities included by reference to the Agricultural Marketing Act.

"PRODUCTION, CULTIVATION, GROWING, AND HARVESTING" OF COMMODITIES

780.117 "Production, cultivation, growing."
780.118 "Harvesting."

RAISING OF LIVESTOCK, BEES, FUR-BEARING ANIMALS, OR POULTRY

780.119 Employment in the specified operations generally.
780.120 Raising of "livestock."
780.121 What constitutes "raising" of livestock.
780.122 Activities relating to race horses.
780.123 Raising of bees.
780.124 Raising of fur-bearing animals.
780.125 Raising of poultry in general.
780.126 Contract arrangements for raising poultry.
780.127 Hatchery operations.

PRACTICES EXEMPT UNDER "SECONDARY" MEANING OF AGRICULTURE GENERALLY

780.128 General statement on "secondary" agriculture.
780.129 Required relationship of practices to farming operations.

PRACTICES PERFORMED "BY A FARMER"

780.130 Performance "by a farmer" generally.
780.131 Operations which constitute one a "farmer."
780.132 Operations must be performed "by" a farmer.
780.133 Farmers' cooperative as a "farmer."

PRACTICES PERFORMED "ON A FARM"

780.134 Performance "on a farm" generally.
780.135 Meaning of "farm."
780.136 Employment in practices on a farm.

"SUCH FARMING OPERATIONS"—OF THE FARMER

780.137 Practices must be performed in connection with farmer's own farming.
780.138 Application of the general principles.
Sec.
780.139 Pea vining.
780.140 Place of performing the practice as a factor.

"SUCH FARMING OPERATIONS"—ON THE FARM

780.141 Practices must relate to farming operations on the particular farm.
780.142 Practices on a farm not related to farming operations.
780.143 Practices on a farm not performed for the farmer.

PERFORMANCE OF THE PRACTICE "AS AN INCIDENT TO OR IN CONJUNCTION WITH" THE FARMING OPERATIONS

780.144 "As an incident to or in conjunction with" the farming operations.
780.145 The relationship is determined by consideration of all relevant factors.
780.146 Importance of relationship of the practice to farming generally.
780.147 Practices performed on farm products—special factors considered.

PRACTICES INCLUDED WHEN PERFORMED AS PROVIDED IN SECTION 3(f)

780.148 "Any" practices meeting the requirements will qualify for exemption.
780.149 Named practices as well as others must meet the requirements.

PREPARATION FOR MARKET

780.150 Scope and limits of "preparation for market."
780.151 Particular operations on commodities.

SPECIFIED DELIVERY OPERATIONS

780.152 General scope of specified delivery operations.
780.153 Delivery "to storage."
780.154 Delivery "to market."
780.155 Delivery "to carriers for transportation to market."

TRANSPORTATION OPERATIONS NOT MENTIONED IN SECTION 3(f)

780.156 Transportation of farm products from the fields or farm.
780.157 Other transportation incident to farming.

OTHER UNLISTED PRACTICES WHICH MAY BE WITHIN SECTION 3(f)

780.158 Examples of other practices within section 3(f) if requirements are met.

Subpart C—Agriculture as It Relates to Specific Situations

FORESTRY OR LUMBERING OPERATIONS

780.200 Inclusion of forestry or lumbering operations in agriculture is limited.

BEST DOCUMENT AVAILABLE

Sec.

780.201 Meaning of "forestry or lumbering operations."
780.202 Subordination to farming operations is necessary for exemption.
780.203 Performance of operations on a farm but not by the farmer.
780.204 Number of employees engaged in operations not material.

NURSERY AND LANDSCAPING OPERATIONS

780.205 Nursery activities generally.
780.206 Planting and lawn mowing.
780.207 Operations with respect to wild plants.
780.208 Forest and Christmas tree activities.
780.209 Packing, storage, warehousing, and sale of nursery products.

HATCHERY OPERATIONS

780.210 The typical hatchery operations constitute "agriculture."
780.211 Contract production of hatching eggs.
780.212 Hatchery employees working on farms.
780.213 Produce business.
780.214 Feed sales and other activities.

Subpart D—Employment in Agriculture That Is Exempted From the Minimum Wage and Overtime Pay Requirements Under Section 13(a)(6).

STATUTORY PROVISIONS

780.300 Statutory exemptions in section 13(a) (6).
780.301 Other pertinent statutory provisions.
780.302 Basic conditions of section 13(a) (6) (A).
780.303 Exemption applicable on employee basis.
780.304 "Employed by an employer."
780.305 500 man-day provision.
780.306 Calendar quarter of the preceding calendar year defined.
780.307 Exemption for employer's immediate family.
780.308 Definition of immediate family.
780.309 Man-day exclusion.
780.310 Exemption for local hand harvest laborers.
780.311 Basic conditions of section 13(a) (6) (C).
780.312 "Hand harvest laborer" defined.
780.313 Piece rate basis.
780.314 Operations customarily * * * paid on a piece rate basis * * *
780.315 Local hand harvest laborers.
780.316 Thirteen week provision.
780.317 Man-day exclusion.
780.318 Exemption for nonlocal minors.
780.319 Basic conditions of exemption.

Sec.

780.320 Nonlocal minors.
780.321 Minors 16 years of age or under.
780.322 Is employed on the same farm as his parent or persons standing in the place of his parent.
780.323 Exemption for range production of livestock.
780.324 Requirements for the exemption to apply.
780.325 Principally engaged.
780.326 On the range.
780.327 Production of livestock.
780.328 Meaning of livestock.
780.329 Exempt work.
780.330 Sharecroppers and tenant farmers.
780.331 Crew leaders and labor contractors.
780.332 Exchange of labor between farmers.

Subpart E—Employment in Agriculture of Irrigation That Is Exempted From the Overtime Pay Requirements Under Section 13(b)(12)

780.400 Statutory provisions.
780.401 General explanatory statement.
780.402 The general guides for applying the exemption.
780.403 Employee basis of exemption under section 13(b) (12).
780.404 Activities of the employer considered in some situations.

THE IRRIGATION EXEMPTION

780.405 Exemption is direct and does not mean activities are agriculture.
780.406 Exemption is from overtime only.
780.407 System must be nonprofit or operated on a share-crop basis.
780.408 Facilities of system must be used exclusively for agricultural purposes.
780.409 Employment "in connection with the operation or maintenance" is exempt.

Subpart F—Employment or Agricultural Employees in Processing Shade-Grown Tobacco; Exemption From Minimum Wage and Overtime Pay Requirements Under Section 13(a) (14)

INTRODUCTORY

780.500 Scope and significance of interpretative bulletin.
780.501. Statutory provision.
780.502 Legislative history of exemption.
780.503 What determines the application of the exemption.

REQUIREMENTS FOR EXEMPTION

780.504 Basic conditions of exemption.

BEST DOCUMENT AVAILABLE

SHADE-GROWN TOBACCO

Sec.
780.505 Definition of "shade-grown tobacco."
780.506 Dependence of exemption on shade-grown tobacco operations.
780.507 "Such tobacco."
780.508 Application of the exemption.
780.509 Agriculture.
780.510 "Any agricultural employee."
780.511 Meaning of "agricultural employee."
780.512 "Employed in the growing and harvesting."
780.513 What employment in growing and harvesting is sufficient.
780.514 "Growing" and "harvesting."

EXEMPT PROCESSING

780.515 Processing requirements of section 13(a) (14).
780.516 "Prior to the stemming process."
780.517 "For use as Cigar-wrapper tobacco."
780.518 Exempt processing operations.
780.519 General scope of exempt operations.
780.520 Particular operations which may be exempt.
780.521 Other processing operations.
780.522 Nonprocessing employees.

Subpart G—Employment in Agriculture and Livestock Auction Operations Under the Section 13(b)(13) Exemption

INTRODUCTORY

780.600 Scope and significance of interpretative bulletin.
780.601 Statutory provision.
780.602 General explanatory statement.

REQUIREMENTS FOR EXEMPTION

780.603 What determines application of exemption.
780.604 General requirements.
780.605 Employment in agriculture.
780.606 Interpretation of term "agriculture."
780.607 "Primarily employed" in agriculture.
780.608 "During his workweek."
780.609 Workweek unit in applying the exemption.
780.610 Workweek exclusively in exempt work.
780.611 Workweek exclusively in agriculture.
780.612 Employment by a "farmer."
780.613 "By such farmer."
780.614 Definition of a farmer.
780.615 Raising of livestock.
780.616 Operations included in raising livestock.
Sec.
780.617 Adjunct livestock auction operations.
780.618 "His own account"—"in conjunction with other farmers."
780.619 Work "in connection with" livestock auction operations.
780.620 Minimum wage for livestock auction work.

EFFECT OF EXEMPTION

780.621 No overtime wages in exempt week.

Subpart H—Employment by Small Country Elevators Within Area of Production; Exemption From Overtime Pay Requirements Under Section 13(b)(14)

INTRODUCTORY

780.700 Scope and significance of interpretative bulletin.
780.701 Statutory provision.
780.702 What determines application of the exemption.
780.703 Basic requirements for exemption.

ESTABLISHMENT COMMONLY RECOGNIZED AS A COUNTRY ELEVATOR

780.704 Dependence of exemption on nature of employing establishment.
780.705 Meaning of "establishment."
780.706 Recognition of character of establishment.
780.707 Establishments "commonly recognized" as country elevators.
780.708 A country elevator is located near and serves farmers.
780.709 Size and equipment of a country elevator.
780.710 A country elevator may sell products and services to farmers.
780.711 Exemption of mixed business applies only to country elevators.

EMPLOYMENT OF "NO MORE THAN FIVE EMPLOYEES"

780.712 Limitation of exemption to establishments with five or fewer employees.
780.713 Determining the number of employees generally.
780.714 Employees employed "in such operations" to be counted.
780.715 Counting employees "employed in the establishment."

EMPLOYEES "EMPLOYED * * * BY" THE COUNTRY ELEVATOR ESTABLISHMENT

780.716 Exemption of employees "employed * * * by" the establishment.
780.717 Determining whether there is employment "by" the establishment.
780.718 Employees who may be exempt.

BEST DOCUMENT AVAILABLE

Sec.

780.719 Employees not employed "by" the elevator establishment.

Employment "Within the Area of Production"

780.720 "Area of production" requirement of exemption.

Workweek Application of Exemption

780.721 Employment in the particular workweek as test of exemption.
780.722 Exempt workweeks.
780.723 Exempt and nonexempt employment.
780.724 Work exempt under another section of the Act.

Subpart I—Employment in Ginning of Cotton and Processing of Sugar Beets, Sugar-Beet Molasses, Sugarcane, or Maple Sap Into Sugar or Syrup; Exemption From Overtime Pay Requirements Under Section 13(b)(15)

Introductory

780.800 Scope and significance of interpretative bulletin.
780.801 Statutory provisions.
780.802 What determines application of the exemption.
780.803 Basic conditions of exemption; first part, ginning of cotton.

Ginning of Cotton for Market

780.804 "Ginning" of cotton.
780.805 Ginning of "cotton."
780.806 Exempt ginning limited to first processing.
780.807 Cotton must be ginned "for market."

Employees "Engaged In" Ginning

780.808 Who may qualify for the exemption generally.
780.809 Employees engaged in exempt operations
780.810 Employees not "engaged in" ginning.

County Where Cotton Is Grown in Commercial Quantities

780.811 Exemption dependent upon place of employment generally.
780.812 "County."
780.813 "County where cotton is grown."
780.814 "Grown in commercial quantities."
780.815 Basic conditions of exemption; second part, processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.
780.816 Processing of specific commodities.
780.817 Employees engaged in processing.
780.818 Employees not engaged in processing.

Sec.

780.819 Production must be of unrefined sugar or syrup.

Subpart J—Employment in Fruit and Vegetable Harvest Transportation; Exemption From Overtime Pay Requirements Under Section 13(b)(16)

Introductory

780.900 Scope and significance of interpretative bulletin.
780.901 Statutory provisions.
780.902 Legislative history of exemption.
780.903 General scope of exemption.
780.904 What determines the exemption.
780.905 Employers who may claim exemption.

Exempt Operations on Fruits or Vegetables

780.906 Requisites for exemption generally.
780.907 "Fruits or vegetables."
780.908 Relation of employee's work to specified transportation.
780.909 "Transportation."
780.910 Engagement in transportation and preparation.
780.911 Preparation for transportation.
780.912 Exempt preparation.
780.913 Nonexempt preparation.
780.914 "From the farm."
780.915 "Place of first processing."
780.916 "Place of * * * first marketing."
780.917 "Within the same State."

Exempt Transportation of Fruit or Vegetable Harvest Employees

780.918 Requisites for exemption generally.
780.919 Engagement "in transportation" of harvest workers.
780.920 Workers transported must be fruit or vegetable harvest workers.
780.921 Persons "employed or to be employed" in fruit or vegetable harvesting.
780.922 "Harvesting" of fruits or vegetables.
780.923 "Between the farm and any point within the same State."

Subpart K—Employment of Homeworkers in Making Wreaths; Exemption From Minimum Wage, Overtime Compensation, and Child Labor Provisions Under Section 13(d)

Introductory

780.1000 Scope and significance of interpretative bulletin.
780.1001 General explanatory statement.

Requirements for Exemption

780.1002 Statutory requirements.

BEST DOCUMENT AVAILABLE

Sec.
780.1003 What determines the application of the exemption.
780.1004 General requirements.
780.1005 Homeworkers.
780.1006 In or about a home.
780.1007 Exemption is inapplicable if wreath-making is not in or about a home.
780.1008 Examples of places not considered homes.
780.1009 Wreaths.
780.1010 Principally.
780.1011 Evergreens.
780.1012 Other evergreens.
780.1013 Natural evergreens.
780.1014 Harvesting.
780.1015 Other forest products.
780.1016 Use of evergreens and forest products.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201-219.

SOURCE: 37 FR 12084, June 17, 1972, unless otherwise noted.

Subpart A—Introductory

§ 780.0 Purpose of interpretative bulletins in this part.

It is the purpose of the interpretative bulletins in this part to provide an official statement of the views of the Department of Labor with respect to the application and meaning of the provisions of the Fair Labor Standards Act of 1938, as amended, which exempt certain employees from the minimum wage or overtime pay requirements, or both, when employed in agriculture or in certain related activities or in certain operations with respect to agricultural or horticultural commodities.

§ 780.1 General scope of the Act.

The Fair Labor Standards Act is a Federal statute of general application which establishes minimum wage, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. These requirements are applicable, except where exemptions are provided, to employees in those workweeks when they are engaged in interstate or foreign commerce or in the production of goods for such commerce or are employed in enterprises so engaged within the meaning of definitions set forth in the Act. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act, and with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 780.2 Exemptions from Act's requirements.

The Act provides a number of specific exemptions from the general requirements described in § 780.1. Some are exemptions from the overtime provisions only. Others are from the child labor provisions only. Several are exemptions from both the minimum wage and the overtime requirements of the Act. Finally, there are some exemptions from all three—minimum wage, overtime pay, and child labor requirements. An employer who claims an exemption under the Act has the burden of showing that it applies (Walling v. General Industries Co., 330 U.S. 545; Mitchell v. Kentucky Finance Co., 359 U.S. 290). Conditions specified in the language of the Act are "explicit prerequisites to exemption" (Arnold v. Kanowsky, 361 U.S. 388). "The details with which the exemptions in this Act have been made preclude their enlargement by implication" and "no matter how broad the exemption, it is meant to apply only to" the specified activities (Addison v. Holly Hill, 322 U.S. 607; Maneja v. Waialua, 349 U.S. 254). Exemptions provided in the Act "are to be narrowly construed against the employer seeking to assert them" and their application limited to those who come "plainly and unmistakably within their terms and spirit" (Phillips v. Walling, 334 U.S. 490; Mitchell v. Kentucky Finance Co., 359 U.S. 290; Arnold v. Kanowsky, 361 U.S. 388).

§ 780.3 Exemptions discussed in this part.

(a) The specific exemptions which the Act provides for employment in agriculture and in certain operations

BEST DOCUMENT AVAILABLE

more or less closely connected with the agricultural industry are discussed in this Part 780. These exemptions differ substantially in their terms, scope, and methods of application. Each of them is therefore separately considered in a subpart of this part which, together with this Subpart A, constitutes the official interpretative bulletin of the Department of Labor with respect to that exemption. Exemptions from minimum wages and overtime pay and the subparts in which they are considered include the section 13(a)(6) exemptions for employees on small farms, family members, local hand harvest laborers, migrant hand harvest workers under 16, and range production employees discussed in Subpart D of this part, and the section 13(a)(14) exemption for agricultural employees processing shade-grown tobacco discussed in Subpart F of this part.

(b) Exemptions from the overtime pay provisions and the subparts in which these exemptions are discussed include the section 13(b)(12) exemption (agriculture and irrigation) discussed in Subpart E of this part, the section 13(b)(13) exemption (agriculture and livestock auction operations) discussed in Subpart G of this part, the section 13(b)(14) exemption (country elevators) discussed in Subpart H of this part, the section 13(b)(15) exemption (cotton ginning and sugar processing) discussed in Subpart I of this part, and the section 13(b)(16) exemption (fruit and vegetable harvest transportation) discussed in Subpart J of this part.

(c) An exemption in section 13(d) of the Act from the minimum wage, overtime pay, and child labor provisions for certain homeworkers making holly and evergreen wreaths is discussed in Subpart K of this part.

§ 780.4 Matters not discussed in this part.

The application of provisions of the Fair Labor Standards Act other than the exemptions referred to in § 780.3 is not considered in this Part 780. Interpretative bulletins published elsewhere in the Code of Federal Regulations deal with such subjects as the general coverage of the Act (Part 776 of this chapter) and of the child labor provisions (Subpart G of Part 1500 of this title which includes a discussion of the exemption for children employed in agriculture outside of school hours), partial overtime exemptions provided for industries of a seasonal nature under sections 7(c) and 7(d) (Part 526 of this chapter) and for industries with marked seasonal peaks of operations under section 7(d) (Part 526 of this chapter), methods of payment of wages (Part 531 of this chapter), computation and payment of overtime compensation (Part 778 of this chapter), and hours worked (Part 785 of this chapter). Regulations on recordkeeping are contained in Part 516 of this chapter and regulations defining exempt administrative, executive, and professional employees, and outside salesmen are contained in Part 541 of this chapter. Regulations and interpretations on other subjects concerned with the application of the Act are listed in the table of contents to this chapter. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

§ 780.5 Significance of official interpretations.

The regulations in this part contain the official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

§ 780.6 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (Mitchell v. Zachry, 362 U.S. 310; Kirschbaum v. Walling, 316 U.S. 517). Court decisions supporting interpretations contained in this bulletin are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950; 15 FR 3290; Secretary's Order 13-71, May 4, 1971, FR; Secretary's Order 15-71, May 4, 1971, FR). Interpretative rules under the Act as amended in 1966 are also authorized by section 602 of the Fair Labor Standards Amendments of 1966 (80 Stat. 830), which provides: "On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act." As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this bulletin where it appears that they will contribute to a better understanding of the interpretations.

§ 780.7 Reliance on interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. In addition, the Supreme Court has recognized that such interpretations of this Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Further, as stated by the Court: "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (Skidmore v. Swift, 323 U.S. 134). Some of the interpretations in this part are interpretations of exemption provisions as they appeared in the original Act before amendment in 1949, 1961, and 1966, which have remained unchanged because they are consistent with the amendments. These interpretations may be said to have congressional sanction because "When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended. 63 Stat. 920." (Mitchell v. Kentucky Finance Co., 359 U.S. 290; accord, Maneja v. Waialua, 349 U.S. 254.)

§ 780.8 Interpretations made, continued, and superseded by this part.

On and after publication of this Part 780 in the Federal Register, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces the interpretations previously published in the Federal Register and Code of Federal Regulations as this Part 780. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended by the Fair Labor Standards Amendments of 1966 are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met in the consideration of the exemptions discussed. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this bulletin may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

§ 780.9 Related exemptions are interpreted together.

The interpretations contained in the several subparts of this Part 780 consider separately a number of exemptions which affect employees who perform activities in or connected with agriculture and its products. These exemptions deal with related subject matter and varying degrees of relationships between them were the subject of consideration in Congress before their enactment. Together they constitute an expression in some detail of existing Federal policy on the lines to be drawn in the industries connected with agriculture and agricultural products between those employees to whom the pay provisions of the Act are to be applied and those whose exclusion in whole or in part from the Act's requirements has been deemed justified. The courts have indicated that these exemptions, because of their relationship to one another, should be construed together insofar as possible so that they form a consistent whole. Consideration of the language and history of a related exemption or exemptions is helpful in ascertaining the intended scope and application of an exemption whose effect might otherwise not be clear (Addison v. Holly Hill, 322 U.S. 607; Maneja v. Waialua, 349 U.S. 254; Bowie v. Gonzales (C.A. 1), 117 F. 2d 11). In the interpretations of the several exemptions discussed in the various subparts of this Part 780, effect has been given to these principles and each exemption has been considered in its relation to others in the group as well as to the combined effect of the group as a whole.

§ 780.10 Workweek standard in applying exemptions.

The workweek is the unit of time to be taken as the standard in determining the applicability of an exemption. An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week. If in any workweek an employee does only exempt work, he is exempt from the wage and hour provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek or workweeks. An employee may thus be exempt in 1 workweek and not in the next. But the burden of effecting segregation between exempt and nonexempt work as between particular workweeks is upon the employer.

§ 780.11 Exempt and nonexempt work during the same workweek.

Where an employee in the same workweek performs work which is exempt under one section of the Act and also engages in work to which the Act applies but is not exempt under some other section of the Act, he is not exempt that week, and the wage and hour requirements of the Act are applicable (see Mitchell v. Hunt, 263 F. 2d 913; Mitchell v. Maxfield, 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 69, 781; Jordan v. Stark Bros. Nurseries, 45 F. Supp. 769; McComb v. Puerto Rico Tobacco Marketing Co-op Ass'n, 80 F. Supp. 953, affirmed 181 F. 2d 697; Walling v. Peacock Corp., 58 F. Supp. 880-883). On the other hand, an employee who performs exempt activities during a workweek will not lose the exemption by virtue of the fact that he performs other activities outside the scope of the exemption if the other activities are not covered by the Act.

§ 780.12 Work exempt under another section of the Act.

The combination (tacking) of exempt work under one exemption with exempt work under another exemption is permitted. For instance, the overtime pay requirements are not considered applicable to an employee who does work within section 13(b)(12) for only part of a workweek if all of the covered work done by him during the remainder of the workweek is within one or more equivalent exemptions under other provisions of the Act. If the scope of such exemptions is not the same, however, the exemption applicable to the employee is equivalent to that provided by whichever exemption provision is more limited in scope. For instance, an employee who devotes part of a workweek to work within section 13(b)(12) and the remainder to work exempt under section 7(c) must receive the minimum wage and must be paid time and one-half for his overtime work during that week for hours over 10 a day or 50 a week, whichever provides the greater compensation. Each activity is tested separately under the applicable exemption as though it were the sole activity of the employee for the whole workweek in question. The availability of a combination exemption depends on whether the employee meets all the requirements of each exemption which is sought to combine.

Subpart B—General Scope of Agriculture

INTRODUCTORY

§ 780.100 Scope and significance of interpretative bulletin.

Subpart A of this Part 780, this Subpart B and Subparts C, D, and E of this part together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of sections 3(f), 13(a)(6), and 13(b)(12) of the Fair Labor Standards Act of 1938, as amended. Section 3(f) defines "agriculture" as the term is used in the Act. Section 13(a)(6) provides exemption from the minimum wage and overtime pay provisions of the Act for certain employees employed in "agriculture," as so defined. Section 13(b)(12) provides an overtime exemption for any employee employed in agriculture. As appears more fully in Subpart A of this Part 780, interpretations in this bulletin with respect to the provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

§ 780.101 Matters discussed in this subpart.

Section 3(f) defines "agriculture" as this term is used in the Act. Those principles and rules which govern the interpretation of the meaning and application of the Act's definition of "agriculture" in section 3(f) and of the terms used in it are set forth in this Subpart B. Included is a discussion of the application of the definition in section 3(f) to the employees of farmers' cooperative associations. In addition, the official interpretations of section 3(f) of the Act and the terms which appear in it are to be taken into consideration in determining the meaning intended by the use of like terms in particular related exemptions which are provided by the Act.

§ 780.102 Pay requirements for agricultural employees.

Section 6(a)(5) of the Act provides that any employee employed in agriculture must be paid at least $1.30 an hour beginning February 1, 1969. However, there are certain exemptions provided in the Act for agricultural workers, as previously mentioned. (See §§ 780.3 and 780.4.)

§ 780.103 "Agriculture" as defined by the Act.

Section 3(f) of the Act defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

§ 780.104 How modern specialization affects the scope of agriculture.

The effect of modern specialization on agriculture has been discussed by the U.S. Supreme Court as follows:

> Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill. In this way functions which are necessary to the total economic process of supplying an agricultural produce become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a powerplant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture (see Farmers Reservoir Co. v. McComb, 337 U.S. 755 cf. Maneja v. Waialua, 349 U.S. 254).

§ 780.105 "Primary" and "secondary" agriculture under section 3(f).

(a) Section 3(f) of the Act contains a very comprehensive definition of the term "agriculture." The definition has two distinct branches (see Farmers Reservoir Co. v. McComb, 337 U.S. 755). One has relation to the primary meaning of agriculture; the other gives to the term a somewhat broader secondary meaning for purposes of the Act (NLRB v. Olaa Sugar Co., 242 F. 2d 714).

(b) First, there is the primary meaning. This includes farming in all its branches. Listed as being included "among other things" in the primary meaning are certain specific farming operations such as cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry. If an employee is employed in any of these activities, he is engaged in agriculture regardless of whether he is employed by a farmer or on a farm. (Farmers Reservoir Co. v. McComb, supra; Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398.)

(c) Then there is the secondary meaning of the term. The second branch includes operations other than those which fall within the primary meaning of the term. It includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with "such" farming operations (Farmers Reservoir Co. v. McComb, supra; NLRB v. Olaa Sugar Co., 242 F. 2d 714; Maneja v. Waialua, 349 U.S. 254).

(d) Employment not within the scope of either the primary or the secondary meaning of "agriculture" as defined in section 3(f) is not employment in agriculture. In other words, employees not employed in farming or by a farmer or on a farm are not employed in agriculture.

EXEMPTION FOR "PRIMARY" AGRICULTURE GENERALLY

§ 780.106 Employment in "primary" agriculture is farming regardless of why or where work is performed.

When an employee is engaged in direct farming operations included in the primary definition of "agriculture," the purpose of the employer in performing the operations is immaterial. For example, where an employer owns a factory and a farm and operates the farm only for experimental purposes in connection with the factory, those employees who devote all their time during a particular workweek to the direct farming operations, such as the growing and harvesting of agricultural commodities, are considered as employed in agriculture. It is also immaterial whether the agricultural or horticultural commodities are grown in enclosed houses, as in greenhouses or mushroom cellars, or in an open field. Similarly, the mere fact that production takes place in a city or on industrial premises, such as in hatcheries, rather than in the country or on premises possessing the normal characteristics of a farm makes no difference (see Jordan v. Stark Brothers Nurseries, 45 F. Supp. 769; Miller Hatcheries v. Boyer, 131 F. 2d 283; Damutz v. Pinchbeck, 158 F. 2d 882).

FARMING IN ALL ITS BRANCHES

§ 780.107 Scope of the statutory term.

The language "farming in all its branches" includes all activities, whether listed in the definition or not, which constitute farming or a branch thereof under the facts and circumstances.

§ 780.108 Listed activities.

Section 3(f), in defining the practices included as "agriculture" in its statutory secondary meaning, refers to the activities specifically listed in the earlier portion of the definition (the "primary" meaning) as "farming" operations. They may therefore be considered as illustrative of "farming in all its branches" as used in the definition.

§ 780.109 Determination of whether unlisted activities are "farming."

Unlike the specifically enumerated operations, the phrase "farming in all its branches" does not clearly indicate its scope. In determining whether an operation constitutes "farming in all its branches," it may be necessary to consider various circumstances such as the nature and purpose of the operations of the employer, the character of the place where the employee performs his duties, the general types of activities there conducted, and the purpose and function of such activities with respect to the operations carried on by the employer. The determination may involve a consideration of the principles contained in § 780.104. For example, fish farming activities fall within the scope of the meaning of "farming in all its branches" and employers engaged in such operations would be employed in agriculture. On the other hand, so-called "bird dog" operations of the citrus fruit industry consisting of the purchase of fruit unsuitable for packing and of the transportation and sale of the fruit to canning plants do not qualify as "farming" and, consequently, employees engaged in such operations are not employed in agriculture. (See Chapman v. Durkin, 214 F. 2d 360 cert. denied 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363 cert. denied, 348 U.S. 897.) However, employees gathering the fruit at the groves are considered agricultural workers because they are engaged in harvesting operations. (For exempt transportation, see Subpart J of this part.)

CULTIVATION AND TILLAGE OF THE SOIL

§ 780.110 Operations included in "cultivation and tillage of the soil."

"Cultivation and tillage of the soil" includes all the operations necessary to prepare a suitable seedbed, eliminate weed growth, and improve the physical condition of the soil. Thus, grading or leveling land or removing rock or other matter to prepare the ground for a proper seedbed or building terraces on farmland to check soil erosion are included. The application of water, fertilizer, or limestone to farmland is also included. (See in this connection §§ 780.128 et seq. Also see Farmers Reservoir Co. v. McComb, 337 U.S. 755.) Other operations such as the commercial production and distribution of fertilizer are not included within the scope of agriculture. (McComb v. Super-A Fertilizer Works, 165 F. 2d 824; Farmers Reservoir Co. v. McComb, 337 U.S. 755.)

DAIRYING

§ 780.111 "Dairying" as a farming operation.

"Dairying" includes the work of caring for and milking cows or goats. It also includes putting the milk in containers, cooling it, and storing it where done on the farm. The handling of milk and cream at receiving stations is not included. Such operations as separating cream from milk, bottling milk and cream, or making butter and cheese may be considered as "dairying" under some circumstances, or they may be considered practices under the "secondary" meaning of the definition when performed by a farmer or on a farm, if they are not performed on milk produced by other farmers or produced on other farms. (See the discussions in §§ 780.128 et seq.)

AGRICULTURAL OR HORTICULTURAL COMMODITIES

§ 780.112 General meaning of "agriculture or horticultural commodities."

Section 3(f) of the Act defines as "agriculture" the "production, cultivation, growing, and harvesting" of "agricultural or horticultural commodities," and employees employed in such operations are engaged in agriculture. In general, within the meaning of the Act, "agricultural or horticultural commodities" refers to commodities resulting from the application of agricultural or horticultural techniques. Insofar as the term refers to products of the soil, it means commodities that are planted and cultivated by man. Among such commodities are the following: Grains, forage crops, fruits, vegetables, nuts, sugar crops, fiber crops, tobacco, and nursery products. Thus, employees engaged in growing wheat, corn, hay, onions, carrots, sugar cane, seed, or any other agricultural or horticultural commodity are engaged in "agriculture." In addition to such products of the soil, however, the term includes domesticated animals and some of their products such as milk, wool, eggs, and honey. The term does not include commodities produced by industrial techniques, by exploitation of mineral wealth or other natural resources, or by uncultivated natural growth. For example, peat humus or peat moss is not an agricultural commodity. Wirtz v. Ti Ti Peat Humus Co., 373 f(2d) 209 (C.A.4).

§ 780.113 Seeds, spawn, etc.

Seeds and seedlings of agricultural and horticultural plants are considered "agricultural or horticultural commodities." Thus, since mushrooms and beans are considered "agricultural or horticultural commodities," the spawn of mushrooms and bean sprouts are also so considered and the production, cultivation, growing, and harvesting of mushroom spawn or bean sprouts is "agriculture" within the meaning of section 3(f).

§ 780.114 Wild commodities.

Employees engaged in the gathering or harvesting of wild commodities such as mosses, wild rice, burls and laurel plants, the trapping of wild animals, or the appropriation of minerals and other uncultivated products from the soil are not employed in "the production, cultivation, growing, and harvesting of agricultural or horticultural commodities." However, the fact that plants or other commodities actually cultivated by men are of a species which ordinarily grows wild without being cultivated does not preclude them from being classed as "agricultural or horticultural commodities." Transplanted branches which were cut from plants growing wild in the field or forest are included within the term. Cultivated blueberries are also included.

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not "agricultural or horticultural commodities." Christmas trees, whether wild or planted, are also not so considered. It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.160-780.164 which discuss the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute "agriculture." For a discussion of the exemption in section 13(a)(13) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see Part 788 of this chapter.

§ 780.116 Commodities included by reference to the Agricultural Marketing Act.

(a) Section 3(f) expressly provides that the term "agricultural or horticultural commodities" shall include the commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141-1141j). Section 15(g) of that Act provides: "As used in this act, the term 'agricultural commodity' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producers of the crude gum (oleoresin) from which derived: Gum spirits of turpentine, and gum resin, as defined in the Naval Stores Act, approved March 3, 1923" (7 U.S.C. 91-99). As defined in the Naval Stores Act, "'gum spirits of turpentine' means spirits of turpentine made from gum (oleoresin) from a living tree" and "'gum rosin' means rosin remaining after the distillation of gum spirits of turpentine." The production of these commodities is therefore within the definition of "agriculture."

(b) Since the only oleoresin included within section 15(g) of the Agricultural Marketing Act is that derived from a living tree, the production of oleoresin from stumps or any sources other than living trees is not within section 3(f). If turpentine or rosin is produced in any manner other than the processing of crude gum from living trees, as by digging up pine stumps and grinding them or by distilling the turpentine with steam from the oleoresin within or extracted from the wood, the production of the turpentine or rosin is not included in section 3(f).

(c) Similarly, the production of gum turpentine or gum rosin is not included when these are produced by anyone other than the original producer of the crude gum from which they are derived. Thus, if a producer of turpentine or rosin from oleoresin from living trees makes such products not only from oleoresin produced by him but also from oleoresin delivered to him by others, he is not producing a product defined as an agricultural commodity and employees engaged in his production operations are not agricultural employees. (For an explanation of the inclusion of the word "production" in section 3(f), see § 780.117(b).) It is to be noted, however, that the production of gum turpentine and gum rosin from crude gum (oleoresin) derived from a living tree is included within section 3(f) when performed at a central still for and on account of the producer of the crude gum. But where central stills buy the crude gum they process and are the owners of the gum turpentine and gum rosin that are derived from such crude gum and which they market for their own account, the production of such gum turpentine and gum rosin is not within section 3(f).

"PRODUCTION, CULTIVATION, GROWING, AND HARVESTING" OF COMMODITIES

§ 780.117 "Production, cultivation, growing."

(a) The words "production, cultivation, growing" describe actual raising operations which are normally intended or expected to produce specific agricultural or horticultural commodities. The raising of such commodities is included even though done for purely experimental purposes. The "growing" may take place in growing media other than soil as in the case of hydroponics. The words do not include operations undertaken or conducted for purposes not concerned with obtaining any specific agricultural or horticultural commodity. Thus operations which are merely preliminary, preparatory or incidental to the operations whereby such commodities are actually produced are not within the terms "production, cultivation, growing". For example, employees of a processor of vegetables who are engaged in buying vegetable plants and distributing them to farmers with whom their employer has acreage contracts are not engaged in the "production, cultivation, growing" of agricultural or horticultural commodities. The furnishing of mushroom spawn by a canner of mushrooms to growers who supply the canner with mushrooms grown from such spawn does not constitute the "growing" of mushrooms. Similarly, employees of the employer who is engaged in servicing insecticide sprayers in the farmer's orchard and employees engaged in such operations as the testing of soil or genetics research are not included within the terms. (However, see §§ 780.128, et seq., for possible exemption on other grounds.) The word "production," used in conjunction with "cultivation, growing, and harvesting," refers, in its natural and unstrained meaning, to what is derived and produced from the soil, such as any farm produce. Thus, "production" as used in section 3(f) does not refer to such operations as the grinding and processing of sugarcane, the milling of wheat into flour, or the making of cider from apples. These operations are clearly the processing of the agricultural commodities and not the production of them (Bowie v. Gonzalez, 117 F. 2d 11).

(b) The word "production" was added to the definition of "agriculture" in order to take care of a special situation—the production of turpentine and gum rosins by a process involving the tapping of living trees. (See S. Rep. No. 230, 71st Cong., second sess. (1930); H.R. Rep. No. 2738, 75th Cong., third sess. p. 29 (1938).) To insure the inclusion of this process within the definition, the word "production" was added to section 3(f) in conjunction with the words "including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended" (Bowie v. Gonzalez, 117 F. 2d 11). It is clear, therefore, that "production" is not used in section 3(f) in the artificial and special sense in which it is defined in section 3(j). It does not exempt an employee merely because he is engaged in a closely related process or occupation directly essential to the production of agricultural or horticultural commodities. To so construe the term would render unnecessary the remainder of what Congress clearly intended to be a very elaborate and comprehensive definition of "agriculture." The legislative history of this part of the definition was considered by the U.S. Supreme Court in reaching these conclusions in Farmers Reservoir Co. v. McComb, 337 U.S. 755.

§ 780.118 "Harvesting."

(a) The term "Harvesting" as used in section 3(f) includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position (Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398; NLRB v. Olaa Sugar Co., 242 F. 2d 714). Examples include the cutting of grain, the picking of fruit, the stripping of bluegrass seed, and the digging up of shrubs and trees grown in a nursery. Employees engaged on a plantation in gathering sugarcane as soon as it has been cut, loading it, and transporting the cane to a concentration point on the farm are engaged in "Harvesting" (Vives v. Serralles, 145 F. 2d 552).

(b) The combining of grain is exempt either as harvesting or as a practice performed on a farm in conjunction with or as an incident to farming operations. (See in this connection Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398.) "Harvesting" does not extend to operations subsequent to and unconnected with the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession. For example, the processing of sugarcane into raw sugar (Bowie v. Gonzalez, 117 F. 2d 11, and see Maneja v. Waialua, 349 U.S. 254), or the vining of peas are not included. For a further discussion on vining employees, see § 780.139. While transportation to a concentration point on the farm may be included, "harvesting" never extends to transportation or other operations off the farm. Off-the-farm transportation can only be "agriculture" when performed by the farmer as an incident to his farming operations (Chapman v. Durkin, 214 F. 2d 360 cert. denied 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363 cert. denied 348

U.S. 897). For further discussion of this point, see §§ 780.144 through 780.147; §§ 780.152 through 780.157.

RAISING OF LIVESTOCK, BEES, FUR-BEARING ANIMALS, OR POULTRY

§ 780.119 Employment in the specified operations generally.

Employees are employed in the raising of livestock, bees, fur-bearing animals or poultry only if their operations relate to animals of the type named and constitute the "raising" of such animals. If these two requirements are met, it makes no difference for what purpose the animals are raised or where the operations are performed. For example, the fact that cattle are raised to obtain serum or virus or that chicks are hatched in a commercial hatchery does not affect the status of the operations under section 3(f).

§ 780.120 Raising of "livestock."

The meaning of the term "livestock" as used in section 3(f) is confined to the ordinary use of the word and includes only domestic animals ordinarily raised or used on farms. That Congress did not use this term in its generic sense is supported by the specific enumeration of activities, such as the raising of fur-bearing animals, which would be included in the generic meaning of the word. The term includes the following animals, among others: cattle (both dairy and beef cattle), sheep, swine, horses, mules, donkeys, and goats. It does not include such animals as albino and other rats, mice, guinea pigs, and hamsters, which are ordinarily used by laboratories for research purposes (Mitchell v. Maxfield, 12 WH Cases 792 (S.D. Ohio), 29 Labor Cases 68, 781). Fish are not "livestock" (Dunkly v. Erich, 158 F. 2d 1), but employees employed in propagating or farming of fish may qualify for exemption under section 13(a)(6) or 13(b)(12) of the Act as stated in § 780.109 as well as under section 13(a)(5), as explained in Part 784 of this chapter.

§ 780.121 What constitutes "raising" of livestock.

The term "raising" employed with reference to livestock in section 3(f) includes such operations as the breeding, fattening, feeding, and general care of livestock. Thus, employees exclusively engaged in feeding and fattening livestock in stock pens where the livestock remains for a substantial period of time are engaged in the "raising" of livestock. The fact that the livestock is purchased to be fattened and is not bred on the premises does not characterize the fattening as something other than the "raising" of livestock. The feeding and care of livestock does not necessarily or under all circumstances constitute the "raising" of such livestock, however. It is clear, for example, that animals are not being "raised" in the pens of stockyards or the corrals of meat packing plants where they are confined for a period of a few days while en route to slaughter or pending their sale or shipment. Therefore, employees employed in these places in feeding and caring for the constantly changing group of animals cannot reasonably be regarded as "raising" livestock (NLRB v. Tovrea Packing Co., 111 F. 2d 626, cert. denied 311 U.S. 668; Walling v. Friend, 156 F. 2d 429). Employees of a cattle raisers' association engaged in the publication of a magazine about cattle, the detection of cattle thefts, the location of stolen cattle, and apprehension of cattle thieves are not employed in raising livestock and are not engaged in agriculture.

§ 780.122 Activities relating to race horses.

Employees engaged in the breeding, raising, and training of horses on farms for racing purposes are considered agricultural employees. Included are such employees as grooms, attendants, exercise boys, and watchmen employed at the breeding or training farm. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture. For this purpose, a training track at a racetrack is not a farm. Where a farmer is engaged in both the raising and commercial racing of race horses, the activities performed off the farm by his employees as an incident to racing, such as the training and care of the horses, are not practices performed by the farmer in his capacity as a farmer or breeder as an incident to his raising operations. Employees engaged in the feeding, care, and training of horses which have been used in commercial racing and returned to a breeding or training farm for such care pending entry in subsequent races are employed in agriculture.

§ 780.123 Raising of bees.

The term "raising of * * * bees" refers to all of those activities customarily performed in connection with the handling and keeping of bees, including the treatment of disease and the raising of queens.

§ 780.124 Raising of fur-bearing animals.

(a) The term "fur-bearing animals" has reference to animals which bear fur of marketable value and includes, among other animals, rabbits, silver foxes, minks, squirrels, and muskrats. Animals whose fur lacks marketable value, such as albino and other rats, mice, guinea pigs, and hamsters, are not "fur-bearing animals" which within the meaning of section 3(f).

(b) The term "raising" of fur-bearing animals includes all those activities customarily performed in connection with breeding, feeding and caring for fur-bearing animals, including the treatment of disease. Such treatment of disease has reference only to disease of the animals being bred and does not refer to the use of such animals or their fur in experimenting with disease or treating diseases in others. The fact that muskrats or other fur-bearing animals are propagated in open water or marsh areas rather than in pens does not prevent the raising of such animals from constituting the "raising of fur-bearing animals." Where wild fur-bearing animals propagate in their native habitat and are not raised as above described, the trapping or hunting of such animals and activities incidental thereto are not included within section 3(f).

§ 780.125 Raising of poultry in general.

(a) The term "poultry" includes domesticated fowl and game birds. Ducks and pigeons are included. Canaries and parakeets are not included.

(b) The "raising" of poultry includes the breeding, hatching, propagating, feeding, and general care of poultry. Slaughtering, which is the antithesis of "raising," is not included. To constitute "agriculture," slaughtering must come within the secondary meaning of the term "agriculture." The temporary feeding and care of chickens and other poultry for a few days pending sale, shipment or slaughter is not the "raising" of poultry. However, feeding, fattening and caring for poultry over a substantial period may constitute the "raising" of poultry.

§ 780.126 Contract arrangements for raising poultry.

Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.137 et seq., and Johnston v. Cotton Producers Assn., 244 F. 2d 553).

§ 780.127 Hatchery operations.

Hatchery operations incident to the breeding of poultry, whether performed in a rural or urban location, are the "raising of poultry" (Miller Hatcheries v. Boyer, 131 F. 2d 283). The application of section 3(f) to employees of hatcheries is further discussed in §§ 780.210 through 780.214.

PRACTICES EXEMPT UNDER "SECONDARY" MEANING OF AGRICULTURE GENERALLY

§ 780.128 General statement on "secondary" agriculture.

The discussion in §§ 780.106–780.127 relates to the direct farming operations which come within the "primary" meaning of the definition of "agriculture." As defined in section 3(f) "agriculture" includes not only the farming activities described in the "primary" meaning but also includes, in its "secondary" meaning, "any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market delivery to storage or to market or to carriers for transportation to market." The legislative history makes it plain that this language was particularly included to make certain that independent contractors such as threshers of wheat, who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task and also to assist a farmer in getting his agricultural goods to market in their raw or natural state, should be included within the definition of agricultural employees (see Bowie v. Gonzalez, 117 F. 2d 11; 81 Cong. Rec. 7876, 7888).

§ 780.129 Required relationship of practices to farming operations.

To come within this secondary meaning, a practice must be performed either by a farmer or on a farm. It must also be performed either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed. In addition, the practice must be performed "as an incident to or in conjunction with" the farming operations. No matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the "secondary" meaning of "agriculture." Thus, employees employed by commission brokers in the typical activities conducted at their establishments, warehouse employees at the typical tobacco warehouses, shop employees of an employer engaged in the business of servicing machinery and equipment for farmers, plant employees of a company dealing in eggs or poultry produced by others, employees of an irrigation company engaged in the general distribution of water to farmers, and other employees similarly situated do not generally come within the secondary meaning of "agriculture." The inclusion of industrial operations is not within the intent of the definition in section 3(f), nor are processes that are more akin to manufacturing than to agriculture (see Bowie v. Gonzales, 117 F. 2d 11; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398; Maneja v. Waialua, 349 U.S. 254; Mitchell v. Budd, 350 U.S. 473).

PRACTICES PERFORMED "BY A FARMER"

§ 780.130 Performance "by a farmer" generally.

Among other things, a practice must be performed by a farmer or on a farm in order to come within the secondary portion of the definition of "agriculture." No precise lines can be drawn which will serve to delimit the term "farmer" in all cases. Essentially, however, the term is an occupational title and the employer must be engaged in activities of a type and to the extent that the person ordinarily regarded as a "farmer" is engaged in order to qualify for the title. If this test is met, it is immaterial for what purpose he engages in farming or whether farming is his sole occupation. Thus, an employer's status as a "farmer" is not altered by the fact that his only purpose is to obtain products useful to him in a non-farming enterprise which he conducts. For example, an employer engaged in raising nursery stock is a "farmer" for purposes of section 3(f) even though his purpose is to supply goods for a separate establishment where he engages in the retail distribution of nursery products. The term "farmer" as used in section 3(f) is not confined to individual persons. Thus an association, a partnership, or a corporation which engages in actual farming operations may be a "farmer" (see Mitchell v. Budd, 350 U.S. 473). This is so even where it operates "what might be called the agricultural analogue of the modern industrial assembly line" (Maneja v. Waialua, 349 U.S. 254).

§ 780.131 Operations which constitute one a "farmer."

Generally, an employer must undertake farming operations of such scope and significance as to constitute a distinct activity, for the purpose of yielding a farm product, in order to be regarded as a "farmer." It does not necessarily follow, however, that any employer is a "farmer" simply because he engages in some actual farming operations of the type specified in section 3(f). Thus, one who merely harvests a crop of agricultural commodities is not a "farmer" although his employees who actually do the harvesting are employed in "agriculture" in those weeks when exclusively so engaged. As a general rule, a farmer performs his farming operations on land owned, leased, or controlled by him and devoted to his own use. The mere fact, therefore, that an employer harvests a growing crop, even under a partnership agreement pursuant to which he provides credit, advisory or other services, is not generally considered to be sufficient to qualify the employer so engaged as a "farmer." Such an employer would stand, in packing or handling the product, in the same relationship to the produce as if it were from the fields or groves of an independent grower. One who engaged merely in practices which are incidental to farming is not a "farmer." For example, a company which merely prepares for market, sells, and ships flowers and plants grown and cultivated on farms by affiliated corporations is not a "farmer." The fact that one has suspended actual farming operations during a period in which he performs only practices incidental to his part or prospective farming operations does not, however, preclude him from qualifying as a "farmer." One otherwise qualified as a farmer does not lose his status as such because he performs farming operations on land which he does not own or control, as in the case of a cattleman using public lands for grazing.

§ 780.132 Operations must be performed "by" a farmer.

"Farmer" includes the employees of a farmer. It does not include an employer merely because he employs a farmer or appoints a farmer as his agent to do the actual work. Thus, the stripping of tobacco, i.e., removing leaves from the stalk, by the employees of an independent warehouse is not a practice performed "by a farmer" even though the warehouse acts as agent for the tobacco farmer or employs the farmer in the stripping operations. One who merely performs services or supplies materials for farmers in return for compensation in money or farm products is not a "farmer." Thus, a person who provides credit and management services to farmers cannot qualify as a "farmer" on that account. Neither can a repairman who repairs and services farm machinery qualify as a "farmer" on that basis. Where crops are grown under contract with a person who provides a market, contributes counsel and advice, make advances and otherwise assists the grower who actually produces the crop, it is the grower and not the person with whom he contracts who is the farmer with respect to that crop (Mitchell v. Huntsville Nurseries, 267 F. 2d 286).

§ 780.133 Farmers' cooperative as a "farmer."

(a) The phrase "by a farmer" covers practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative association, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed "by a farmer" but for farmers. Therefore, employees of a farmers' cooperative association are not generally engaged in any practices performed "by a farmer" within the meaning of section 3(f) (Farmers Reservoir Co. v. McComb, 337 U.S. 755; Goldberg v. Crowley Ridge Ass'n., 295 F. 2d 7; McComb v. Puerto Rico Tobacco Marketing Co-op Ass'n., 80 F. Supp. 953, 181 F. 2d 697). The legislative history of the Act supports this interpretation. Statutes usually cite farmers' cooperative associations in express terms if it is intended that they be included. The omission of express language from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives.

(b) It is possible that some farmers' cooperative associations may themselves engage in actual farming operations to an extent and under circumstances sufficient to qualify as a "farmer." In such case, any of their employees who perform practices as an incident to or in conjunction with such farming operations are employed in "agriculture."

PRACTICES PERFORMED "ON A FARM"

§ 780.134 Performance "on a farm" generally.

If a practice is not performed by a farmer, it must, among other things, be performed "on a farm" to come within the secondary meaning of "agriculture" in section 3(f). Any practice which cannot be performed on a farm, such as "delivery to market," is necessarily excluded, therefore, when performed by someone other than a farmer (see Farmers Reservoir Co. v. McComb, 337 U.S. 755; Chapman v. Durkin, 214 F. 2d 360, cert. denied 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363, cert. denied 348 U.S. 897). Thus, employees of an alfalfa dehydrator engaged in hauling chopped or unchopped alfalfa away from the farms to the dehydrating plant are not employed in a practice performed "on a farm."

§ 780.135 Meaning of "farm."

A "farm" is a tract of land devoted to the actual farming activities included in the first part of section 3(f). Thus, the gathering of wild plants in the woods for transplantation in a nursery is not an operation performed "on a farm." (For a further discussion, see § 780.207.) The total area of a tract operated as a unit for farming purposes is included in the "farm," irrespective of the fact that some of this area may not be utilized for actual farming operations (see NLRB v. Olaa Sugar Co., 242 F. 2d 714; In re Princeville Canning Co., 14 WH Cases 641 and 762). It is immaterial whether a farm is situated in the city or in the country. However, a place in a city where no primary farming operations are performed is not a farm even if operated by a farmer (Mitchell v. Huntsville Nurseries, 267 F. 2d 286).

§ 780.136 Employment in practices on a farm.

Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed "on a farm." Whether such employees are engaged in "agriculture" depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141 through 780.147; that is, whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§ 780.104 through 780.144). Even though an employee may work on several farms during a workweek, he is regarded as employed "on a farm" for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion. Thus, an employee may spend a small amount of time within the workweek in transporting necessary equipment for work to be done on farms. Field employees of a canner or processor of farm products who work on farms during the planting and growing season where they supervise the planting operations and consult with the grower on problems of cultivation are employed in practices performed "on a farm" so long as such work is done entirely on farms save for an incidental amount of reporting to their employer's plant. Other employees of the above employers employed away from the farm would not come within section 3(f). For example, airport employees such as mechanics, loaders, and office workers employed by a crop dusting firm would not be agriculture employees (Wirtz v. Boyls dba Boyls Dusting and Spraying Service 230 F. Supp. 246, aff'd per curiam 352 F. 2d 63; Tobin v. Wenatchee Air Service, 10 WH Cases 680, 21 CCH Lab Cas. Paragraph 67,019 (E.D. Wash.)).

"SUCH FARMING OPERATION"—OF THE FARMER

§ 780.137 Practices must be performed in connection with farmer's own farming.

"Practices * * * performed by a farmer" must be performed as an incident to or in conjunction with "such farming operations" in order to constitute "agriculture" within the secondary meaning of the term. Practices performed by a farmer in connection with his nonfarming operations do not satisfy this requirement (see Calaf v. Gonzalez, 127 F. 2d 934; Mitchell v. Budd, 350 U.S. 473). Furthermore, practices performed by a farmer can meet the above requirement only in the event that they are performed in connection with the farming operations of the same farmer who performs the practices. Thus, the requirement is not met with respect to employees engaged in any practices performed by their employer in connection with farming operations that are not his own (see Farmers Reservoir Co. v. McComb, 337 U.S. 755; Mitchell v. Hunt, 263 F. 2d 913; NLRB v. Olaa Sugar Co., 242 F. 2d 714; Mitchell v. Huntsville Nurseries, 267 F. 2d 286; Bowie v. Gonzalez, 117 F. 2d 11). The processing by a farmer of commodities of other farmers, if incident to or in conjunction with farming operations, is incidental to or in conjunction with the farming operations of the other farmers and not incidental to or in conjunction with the farming operations of the farmer doing the processing (Mitchell v. Huntsville Nurseries, supra; Farmers Reservoir Co. v. McComb, supra; Bowie v. Gonzalez, supra).

§ 780.138 Application of the general principles.

Some examples will serve to illustrate the above principles. Employees of a fruit grower who dry or pack fruit not grown by their employer are not within section (f). This is also true of storage operations conducted by a farmer in connection with products grown by someone other than the farmer. Employees of a grower-operator of a sugarcane mill who transport cane from fields to the mill are not within section 3(f), where such cane is grown by independent farmers on their land as well as by the mill operator (Bowie v. Gonzalez, 117 F. 2d 11). Employees of a tobacco grower who strip tobacco (i.e., remove the leaves from the stalk) are not agricultural employees when performing this operation on tobacco not grown by their employer. On the other hand, where a farmer rents some space in a warehouse or packinghouse located off the farm and the farmer's own employees there engage in handling or packing only his own products for market, such operations by the farmers are within section 3(f) if performed as an incident to or in conjunction with his farming operations. Such arrangements are distinguished from those where the employees are not actually employed by the farmer. The fact that a packing shed is conducted by a family partnership, packing products exclusively grown on lands owned and operated by individuals constituting the partnership, does not alter the status of the packing activity. Thus, if in a particular case an individual farmer is engaged in agriculture, a family partnership which performs the same operations would also be engaged in agriculture. (Dofflemeyer v. NLRB, 206 F. 2d 813.) However, an incorporated association of farmers that does not itself engage in farming operations is not engaged in agriculture though it processes at its packing shed produce grown exclusively by the farmer members of the association. (Goldberg v. Crowley Ridge and Fruit Growers Association, 295 F. 2d 7 (C.A. 8).)

§ 780.139 Pea vining.

Vining employees of a pea vinery located on a farm, who vine only the peas grown on that particular farm, are engaged in agriculture. If they also vine peas grown on other farms, such operations could not be within section 3(f) unless the farmer-employer owns or operates the other farms and vines his own peas exclusively. However, the work of vining station employees in weeks in which the stations vine only peas grown by a canner on farms owned or leased by him is considered part of the canning operations. As such, the cannery operations, including the vining operations, are within section 3(f) only if the canners can crops which he grows himself and if the canning operations are subordinate to the farming operations.

§ 780.140 Place of performing the practice as a factor.

So long as the farming operations to which a farmer's practice pertains are performed by him in his capacity as a farmer, the status of the practice is not necessarily altered by the fact that the farming operations take place on more than one farm or by the fact that some of the operations are performed off his farm (NLRB v. Olaa Sugar Co., 242 F. 2d 714). Thus, where the practice is performed with respect to products of farming operations, the controlling consideration is whether the products were produced by the farming operations of the farmer who performs the practice rather than at what place or on whose land he produced them. Ordinarily, a practice performed by a farmer in connection with farming operations conducted on land which he owns or leases will be considered as performed in connection with the farming operations of such farmer in the absence of facts indicating that the farming operations are actually those of someone else. Conversely, a contrary conclusion will ordinarily be justified if such farmer is not the owner or a bona fide lessee of such land during the period when the farming operations take place. The question of whose farming operations are actually being conducted in cases where they are performed pursuant to an agreement or arrangement, not amounting to a bona fide lease, between the farmer who performs the practice and the landowner necessarily involves a careful scrutiny of the facts and circumstances surrounding the arrangement. Where commodities are grown on the farm of the actual grower under contract with another, practices performed by the latter on the commodities, off the farm where they were grown, relate to farming operations of the grower rather than to any farming operations of the contract purchaser. This is true even though the contract purports to lease the land to the latter, give him the title to the crop at all times, and confer on him the right to supervise the growing operations, where the facts as a whole show that the contract purchaser provides a farm market, cash advances, and advice and counsel but does not really perform growing operations (Mitchell v. Huntsville Nurseries, 267 F. 2d 286).

"SUCH FARMING OPERATIONS"—ON THE FARM

§ 780.141 Practices must relate to farming operations on the particular farm.

"Practices * * * performed * * * on a farm" must be performed as an incident to or in conjunction with "such farming operations" in order to constitute "agriculture" within the secondary meaning of the term. No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless all of such commodities are the products of that farm. Thus, the performance on a farm of any practice, such as packing or storing, which may be incidental to farming operations cannot constitute a basis for considering the employees engaged in agriculture if the practice is performed upon any commodities that have been produced elsewhere than on such farm (see Mitchell v. Hunt, 263 F. 2d 913). The construction by an independent contractor of granary on a farm is not connected with "such" farming operations if the farmer for whom it is built intends to use the structure for storing grain produced on other farms. Nor is the requirement met with respect to employees engaged in any other practices performed on a farm, but not by a farmer, in connection with farming operations that are not conducted on that particular farm. The fact that such a practice pertains to farming operations generally or to those performed on a number of farms, rather than to those performed on the same farm only, is sufficient to take it outside the scope of the statutory language. Area soil surveys and genetics research activities, results of which are made available to a number of farmers, are typical of the practices to which this principle applies and which are not within section 3(f) under this provision.

§ 780.142 Practices on a farm not related to farming operations.

Practices performed on a farm in connection with nonfarming operations performed on or off such farm do not meet the requirement stated in § 780.141. For example, if a farmer operates a gravel pit on his farm, none of the practices performed in connection with the operation of such gravel pit would be within section 3(f). Whether or not some practices are performed in connection with farming operations conducted on the farm where they are performed must be determined with reference to the purpose of the farmer for whom the practice is performed. Thus, land clearing operations may or may not be connected with such farming operations depending on whether or not the farmer intends to devote the cleared land to farm use.

§ 780.143 Practices on a farm not performed for the farmer.

The fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted. Thus, where such an employer other than the farmer performs certain work on a farm solely for himself in furtherance of his own enterprise, the practice cannot ordinarily be regarded as performed in connection with farming operations conducted on the farm. For example, it is clear that the work of employees of a utility company in trimming and cutting trees for power and communications lines is part of a nonfarming enterprise outside the scope of agriculture. When a packer of vegetables or dehydrator of alfalfa buys the standing crop from the farmer, harvests it with his own crew of employees, and transports the harvested crop to his off-the-farm packing or dehydrating plant, the transporting and plant employees, who are not engaged in "primary" agriculture as are the harvesting employees (see NLRB v. Olaa Sugar Co., 242 F. 2d 714), are clearly not agricultural employees. Such an employer cannot automatically become an agricultural employer by merely transferring the plant operations to the farm so as to meet the "on a farm" requirement. His employees will continue outside the scope of agriculture if the packing or dehydrating is not in reality done for the farmer. The question of for whom the practices are performed is one of fact. In determining the question, however, the fact that prior to the performance of the packing or dehydrating operations, the farmer has relinquished title and divested himself of further responsibility with respect to the product, is highly significant.

PERFORMANCE OF THE PRACTICE "AS AN INCIDENT TO OR IN CONJUNCTION WITH" THE FARMING OPERATIONS

§ 780.144 "As an incident to or in conjunction with" the farming operations.

In order for practices other than actual farming operations to constitute "agriculture" within the meaning of section 3(f) of the Act, it is not enough that they be performed by a farmer or on a farm in connection with the farming operations conducted by such farmer or on such farm, as explained in §§ 780.129 through 780.143. They must also be performed "as an incident to or in conjunction with" these farming operations. The line between practices that are and those that are not performed "as an incident to or in conjunction with" such farming operations is not susceptible of precise definition. Generally, a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business. Industrial operations (Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398) and processes that are more akin to manufacturing than to agriculture (Maneja v. Waialua, 349 U.S. 254; Mitchell v. Budd, 350 U.S. 473) are not included. This is also true when on-the-farm practices are performed for a farmer. As to when practices may be regarded as performed for a farmer, see § 780.143.

§ 780.145 The relationship is determined by consideration of all relevant factors.

The character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all the relevant facts and circumstances in the light of the pertinent language and intent of the Act. The result will not depend on any mechanical application of isolated factors or tests. Rather, the total situation will control (Maneja v. Waialua, 349 U.S. 254; Mitchell v. Budd, 350 U.S. 473). Due weight should be given to any available criteria which may indicate whether performance of such a practice may properly be considered an incident to farming within the intent of the Act. Thus, the general relationship, if any, of the practice to farming as evidenced by common understanding, competitive factors, and the prevalence of its performance by farmers (see § 780.146), and similar pertinent matters should be considered. Other factors to be considered in determining whether a practice may be properly regarded as incidental to or in conjunction with the farming operations of a particular farmer or farm include the size of the operations and respective sums invested in land, buildings and equipment for the regular farming operations and in plant and equipment for performance of the practice, the amount of the payroll for each type of work, the number of employees and the amount of time they spend in each of the activities, the extent to which the practice is performed by ordinary farm employees and the amount of interchange of employees between the operations, the amount of revenue derived from each activity, the degree of industrialization involved, and the degree of separation established between the activities. With respect to practices performed on farm products (see § 780.147) and in the consideration of any specific practices (see §§ 780.148-780.158 and 780.205-780.214), there may be special factors in addition to those above mentioned which may aid in the determination.

§ 780.146 Importance of relationship of the practice to farming generally.

The inclusion of incidental practices in the definition of agriculture was not intended to include typical factory workers or industrial operations, and the sponsors of the bill made it clear that the erection and operation on a farm by a farmer of a factory, even one using raw materials which he grows, "would not make the manufacturing * * * a farming operation" (see 81 Cong. Rec. 7658; Maneja v. Waialua, 349 U.S. 254). Accordingly, in determining whether a given practice is performed "as an incident to or in conjunction with" farming operations under the intended meaning of section 3(f), the nature of the practice and the circumstances under which it is performed must be considered in the light of the common understanding of what is agricultural and what is not, or the facts indicating whether performance of the practice is in competition with agricultural or with industrial operations, and of the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations (see Bowie v. Gonzales, 117 F. 2d 11; Calaf v. Gonzalez, 127 F. 2d 934; Vives v. Seralles, 145 F. 2d 552; Mitchell v. Hunt, 263 F. 2d 913; Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398; Mitchell v. Budd, 350 U.S. 473; Maneja v. Waialua, supra). Such an inquiry would appear to have a direct bearing on whether a practice is an "established" part of agriculture. The fact that farmers raising a commodity on which a given practice is performed do not ordinarily perform such a practice has been considered a significant indication that the practice is not "agriculture" within the secondary meaning of section 3(f) (Mitchell v. Budd, supra; Maneja v. Waialua, supra). The test to be applied is not the proportion of those performing the practice who produce the commodities on which it is performed but the proportion of those producing such commodities who perform the practice (Maneja v. Waialua, supra). In Mitchell v. Budd, supra, the U.S. Supreme Court found that the following two factors tipped the scales so as to take the employees of tobacco bulking plants outside the scope of agriculture: Tobacco farmers do not ordinarily perform the bulking operation; and, the bulking operation is a process which changes tobacco leaf in many ways and turns it into an industrial product.

§ 780.147 Practices performed on farm products—special factors considered.

In determining whether a practice performed on agricultural or horticultural commodities is incident to or in conjunction with the farming operations of a farmer or a farm, it is also necessary to consider the type of product resulting from the practice—as whether the raw or natural state of the commodity has been changed. Such a change may be a strong indication that the practice is not within the scope of agriculture (Mitchell v. Budd, 350 U.S. 473); the view was expressed in the legislative debates on the Act that it marks the dividing line between processing as an agricultural function and processing as a manufacturing operation (Maneja v. Waialua, 349 U.S. 254, citing 81 Cong. Rec. 7659-7660, 7877-7879). Consideration should also be given to the value added to the product as a result of the practice and whether a sales organization is maintained for the disposal of the product. Seasonality of the operations involved in the practice would not be very helpful as a test to distinguish between operations incident to agriculture and operations of commercial or industrial processors who handle a similar volume of the same seasonal crop. But the length of the period during which the practice is performed might cast some light on whether the operations are conducted as a part of agriculture or as a separate undertaking when considered together with the amount of investment, payroll, and other factors. In some cases, the fact that products resulting from the practice are sold under the producer's own label rather than under that of the purchaser may furnish an indication that the practice is conducted as a separate business activity rather than as a part of agriculture.

PRACTICES INCLUDED WHEN PERFORMED AS PROVIDED IN SECTION 3(f)

§ 780.148 "Any" practices meeting the requirements will qualify for exemption.

The language of section 3(f) of the Act, in defining the "secondary" meaning of "agriculture," provides that any practices performed by a farmer or on a farm as an incident to or in conjunction with such (his or its) farming operations are within the definition. The practices which may be exempt as "agriculture" if so performed are stated to include forestry or lumbering operations, preparation for market, and delivery to storage or to market or to carriers for transportation to market. The specification of these practices is illustrative rather than limiting in nature. The broad language of the definition clearly includes all practices thus performed and not merely those named (see Maneja v. Waialua, 349 U.S. 254).

§ 780.149 Named practices as well as others must meet the requirements.

The specific practices named in section 3(f) must, like any others, be performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, for this condition applies to "any" practices brought within the secondary meaning of agriculture as defined in that section of the Act. Thus the preparation for market, by a farmer's employees on a farm of animals to be sold at a livestock auction is not within section 3(f) if animals from other farmers and other farms are also handled. The practice is not performed as an incident to or in conjunction with "such" farming operations, that is, the operations of the farmer by whom, or of the farm on which, the livestock is raised (Mitchell v. Hunt, 263 F. 2d 913).

PREPARATION FOR MARKET

§ 780.150 Scope and limits of "preparation for market."

"Preparation for market" is also named as one of the practices which may be included in "agriculture." The term includes the operations normally performed upon farm commodities to prepare them for the farmer's market. The farmer's market normally means the wholesaler, processor, or distributing agency to which the farmer delivers his products. "Preparation for market" clearly has reference to activities which precede "delivery to market." It is not, however, synonymous with "preparation for sale." The term must be treated differently with respect to various commodities. It is emphasized that "preparation for market," like other practices, must be performed "by a farmer or on a farm as an incident to or in conjunction with such farming operations" in order to be within section 3(f).

§ 780.151 Particular operations on commodities.

Subject to the rules heretofore discussed, the following activities are, among others, activities that may be performed in the "preparation for market" of the indicated commodities and may come within section 3(f):

(a) *Grain, seed, and forage crops.* Weighing, binning, stacking, drying, cleaning, grading, shelling, sorting, packing, and storing.

(b) *Fruits and vegetables.* Assembling, ripening, cleaning, grading, sorting, drying, preserving, packing, and storing. (See In the Matter of J. J. Crosetti, 29 LRRM 1353, 98 NLRB 268; In the Matter of Imperial Garden Growers, 91 NLRB 1034, 26 LRRM 1632; Lenroot v. Hazelhurst Mercantile Co., 59 F. Supp. 595; North Whittier Heights Citrus Ass'n v. NLRB, 109 F.2d 76; Dofflemeyer v. NLRB, 206 F.2d 813.)

(c) *Peanuts and nuts (pecans, walnuts, etc.).* Grading, cracking, shelling, cleaning, sorting, packing, and storing.

(d) *Eggs.* Handling, cooling, grading, candling, and packing.

(e) *Wool.* Grading and packing.

(f) *Dairy products.* Separating, cooling, packing, and storing.

(g) *Cotton.* Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

(h) *Nursery stock.* Handling, sorting, grading, trimming, bundling, storing, wrapping, and packing. (See Jordan v. Stark Brothers Nurseries, 45 F. Supp. 769; Mitchell v. Huntsville Nurseries, 267 F.2d 286.)

(i) *Tobacco.* Handling, grading, drying, stripping from stalk, tying, sorting, storing, and loading.

(j) *Livestock.* Handling and loading.

(k) *Poultry.* Culling, grading, cooping, and loading.

(l) *Honey.* Assembling, extracting, heating, ripening, straining, cleaning, grading, weighing, blending, packaging, and storing.

(m) *Fur.* Removing the pelt, scraping, drying, putting on boards, and packing.

SPECIFIED DELIVERY OPERATIONS

§ 780.152 General scope of specified delivery operations.

Employment in "secondary" agriculture, under section 3(f), includes employment in "delivery to storage or to market or to carriers for transportation to market" when performed by a farmer as an incident to or in conjunction with his own farming operations. To the extent that such deliveries may be accomplished without leaving the farm where the commodities delivered are grown, the exemption extends also to employees of someone other than the farmer who raised them if they are performing such deliveries for the farmer. However, normally such deliveries require travel off the farm, and where this is the case, only employees of a farmer engaged in making them can come within section 3(f). Such employees would not be engaged in agriculture in any workweek when they delivered commodities of other farmers, however, because such deliveries would not be performed as an incident to or in conjunction with "such" farming operations, as explained previously. If the "delivery" trip is within section 3(f) the necessary return trip to the farm is also included.

§ 780.153 Delivery "to storage."

The term "delivery to storage" includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, furbearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market. The fact that the commodities have been subjected to some other practice "by a farmer or on a farm as an incident to or in conjunction with such farming operations" does not preclude the inclusion of "delivery to storage" within section 3(f). The same is true with respect to "delivery to market" and "delivery to carriers for transporation to market."

§ 780.154 Delivery "to market."

The term "delivery * * * to market" includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, furbearing animals or their pelts, or poultry to market. It ordinarily refers to the initial journey of the farmer's products from the farm to the market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler or processor to which the farmer delivers his products. Delivery to market ends with the delivery of the commodities at the receiving platform of such a farmer's market (Mitchell v. Budd, 350 U.S. 473). When the delivery involves travel off the farm (which would normally be the case) the delivery must be performed by the employees employed by the farmer in order to constitute an agricultural practice. Delivery by an independent contractor for the farmer or a group of farmers or by a "birddog" operator who has purchased the commodities on the farm from the farmer is not an agricultural practice (see Chapman v. Durkin, 214 F. 2d 360, cert. denied 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363, cert. denied 348 U.S. 897). However, in the case of fruits or vegetables, the Act provides a special overtime pay exemption for intrastate transportation of the freshly harvested commodities from the farm to a place of first marketing or first processing, which may apply to employees engaged in such transportation regardless of whether they are employed by the farmer. See Subpart J of this Part 780, discussing the exemption provided by section 13(b)(16).

§ 780.155 Delivery "to carriers for transportation to market."

The term "delivery * * * to carriers for transportation to market" includes taking agricultural or horticultural commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, and poultry to any carrier (including carriers by truck, rail, water, etc.) for transportation by such carrier to market. The market referred to is the farmer's market which normally means the distributing agency, cooperative marketing agency, wholesaler, or processor to which the farmer delivers his products. As in the case of "delivery to market," when it involves travel off the farm (as would normally be the case) the delivery must be performed by the farmer's own employees in order to constitute an agricultural practice. Employees of the carrier who transport to market the commodities which are delivered to it are not within the scope of agriculture.

TRANSPORTATION OPERATIONS NOT MENTIONED IN SECTION 3(f)

§ 780.156 Transportation of farm products from the fields or farm.

Transportation of farm products from the fields where they are grown or from the farm to other places may be within the "secondary" meaning of agriculture, regardless of whether the transportation is included as "delivery to storage or to market or to carriers for transportation to market": *Provided only*, That it is performed by a farmer or on a farm as an incident to or in conjunction with the farming operations of that farmer or that farm.

Of course, any transportation operations which are part of, and not subsequent to, the "primary" farming operations are also within section 3(f). These principles have been recognized by the courts in the following cases, among others: Maneja v. Waialua, 349 U.S. 254; NLRB v. Olaa Sugar Co., 242 F. 2d 714; Bowie v. Gonzales, 117 F. 2d 11; Calaf v. Gonzales, 127 F. 8d 934; Vives v. Serralles, 145 F. 2d 552; Holtville Alfalfa Mills v. Wyatt, 230 F. 2d 398. If not performed by the farmer, transportation beyond the limits of the farm is not within section 3(f), even when performed by a purchaser of the unharvested commodities who has harvested the crop. The scope of section 3(f) includes the harvesting employees but does not extend to the employees transporting the commodities off the farm (Chapman v. Durkin, 214 F. 2d 360, cert. denied, 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363, cert. denied, 348 U.S. 897).

§ 780.157 Other transportation incident to farming.

(a) Transportation by a farmer or on a farm as an incident to or in conjunction with the farming operations of the farmer or of that farm is within the scope of agriculture even though things other than farm commodities raised by the farmer or on the farm are being transported. As previously indicated, transportation of commodities raised by other farmers or on other farms would not be within section 3(f). The definition of agriculture clearly covers the transportation by the farmer, as an incident to or in conjunction with his farming activities, of farm implements, supplies, and fieldworkers to and from the fields, regardless of whether such transportation involves travel on or off the farm and regardless of the method used. The Supreme Court of the United States so held in Maneja v. Waialua, 349 U.S. 254. Transportation of fieldworkers to or from the farm by persons other than the farmer does not come within section 3(f). However, under section 13(b)(16) of the Act, discussed in Subpart J of this Part 780, an overtime pay exemption is provided for transportation, whether or not performed by the farmer, of fruit or vegetable harvest workers to and from the farm, within the same State where the farm is located. In the case of transportation to the farm of materials or supplies, it seems clear that transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as seed, animal or poultry feed, farm machinery or equipment, etc., would be incidental to the farmer's actual farming operations. Thus, truckdrivers employed by a farmer to haul feed to the farm for feeding pigs are engaged in "agriculture."

(b) With respect to the practice of transporting farm products from farms to a processing establishment by employees of a person who owns both the farms and the establishment, such practice may or may not be incident to or in conjunction with the employer's farming operations depending on all the pertinent facts. For example, the transportation is clearly incidental to milling operations, rather than to farming, where the employees engaged in it are hired by the mill, carried on its payroll, do no agricultural work on the farms, and report for and end their daily duties at the mill where the transportation vehicles are kept (Calaf v. Gonzales, 127 F. 2d 934). On the other hand, a different result is reached where the facts show that the transportation workers are farm employees whose work is closely integrated with harvesting and other direct farming operations (NLRB v. Olaa Sugar Co., 242 F. 2d 714; and see Vives v. Serralles, 145 F. 2d 552). The method by which the transportation is accomplished is not material (Maneja v. Waialua, 349 U.S. 254).

OTHER UNLISTED PRACTICES WHICH MAY BE WITHIN SECTION 3(f)

§ 780.158 Examples of other practices within section 3(f) if requirements are met.

(a) As has been noted above, the term "agriculture" includes other practices performed by a farmer or on a farm as an incident to or in conjunction with the farming operations conducted by such farmer or on such farm in addition to the practices listed in section 3(f). The selling (including selling at roadside stands or by mail order and house to house selling) by a farmer and his employees of his agricultural commodities, dairy products, etc., is such a practice provided it does not amount to a separate business. Other such practices are office work and maintenance and protective work. Section 3(f) includes, for example, secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm if their work is part of the agricultural activity and is subordinate to the farming operations of such farmer or on such farm. (Damutz v. Pinchbeck, 66 F. Supp. 667, aff'd. 158 F. 2d 882). Employees of a farmer who repair the mechanical implements used in farming, as a subordinate and necessary task incident to their employer's farming operations, are within section 3(f). It makes no difference that the work is done by a separate labor force in a repair shop maintained for the purpose, where the size of the farming operations is such as to justify it. Only employees engaged in the repair of equipment used in performing agricultural functions would be within section 3(f), however; employees repairing equipment used by the employer in industrial or other nonfarming activities would be outside the scope of agriculture. (Maneja v. Waialua, 349 U.S. 254.) The repair of equipment used by other farmers in their farming operations would not qualify as an agricultural practice incident to the farming operations of the farmer employing the repair workers.

(b) The following are other examples of practices which may qualify as "agriculture" under the secondary meaning in section 3(f), when done on a farm, whether done by a farmer or by a contractor for the farmer, so long as they do not relate to farming operations on any other farms: The operation of a cook camp for the sole purpose of feeding persons engaged exclusively in agriculture on that farm; artificial insemination of the farm animals; custom corn shelling and grinding of feed for the farmer; the packing of apples by portable packing machines which are moved from farm to farm packing only apples grown on the particular farm where the packing is being performed; the culling, catching, cooping, and loading of poultry; the threshing of wheat; the shearing of sheep; the gathering and baling of straw.

(c) It must be emphasized with respect to all practices performed on products for which exemption is claimed that they must be performed only on the products produced or raised by the particular farmer or on the particular farm (Mitchell v. Huntsville Nurseries, 267 F. 2d 286; Bowie v. Gonzalez, 117 F. 2d 11; Mitchell v. Hunt, 263 F. 2d 913; NLRB v. Olaa Sugar Co., 242 F. 2d 714; Farmers Reservoir Co. v. McComb, 337 U.S. 755; Walling v. Peacock Corp., 58 F. Supp. 880; Lenroot v. Hazelhurst Mercantile Co., 153 F. 2d 153; Jordan v. Stark Bros. Nurseries, 45 F. Supp. 769).

Subpart C—Agriculture As It Relates To Specific Situations

Forestry or Lumbering Operations

§ 780.200 Inclusion of forestry or lumbering operations in agriculture is limited.

Employment in forestry or lumbering operations is expressly included in agriculture if the operations are performed "by a farmer or on a farm as an incident to or in conjunction with such farming operation." While "agriculture" is sometimes used in a broad sense as including the science and art of cultivating forests, the language quoted in the preceding sentence is a limitation on the forestry and lumbering operations which will be considered agricultural for purposes of section 3(f). It follows that employees of an employer engaged exclusively in forestry or lumbering operations are not considered agricultural employees.

§ 780.201 Meaning of "forestry or lumbering operations."

The term "forestry or lumbering operations" refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild or planted Christmas trees are included. (See the related discussion in §§ 780.205-780.209 and in Part 788 of this chapter which considers the section 13(a)(13) exemption for forestry or logging operations in which not more than eight employees are employed.) "Wood working" as such is not included in "forestry" or "lumbering" operations. The manufacture of charcoal under modern methods is neither a "forestry". nor "lumbering" operation and cannot be regarded as "agriculture."

§ 780.202 Subordination to farming operations is necessary for exemption.

While section 3(f) speaks of practices performed "in conjunction with" as well as "incident to" farming operations, it would be an unreasonable construction of the Act to hold that all practices were to be regarded as agricultural if the person performing the practice did any farming, no matter how little, or resorted to tilling a small acreage for the purpose of qualifying for exemption (Ridgeway v. Warren, 60 F. Supp. 363 (M.D. Tenn.); in re Combs, 5 WH Cases 595, 10 Labor Cases 62,802 (M.D. Ga.)). To illustrate, where an employer owns several thousand acres of timberland on which he carries on lumbering operations and cultivates about 100 acres of farm land which are contiguous to such timberland, he would not be engaged in agriculture so far as his forestry or lumbering operations are concerned. In such case, the forestry or lumbering operations would clearly not be subordinate to the farming operations but rather the principal or a separate business of the "farmer."

§ 780.203 Performance of operations on a farm but not by the farmer.

Logging or sawmill operations on a farm undertaken on behalf of the farmer or on behalf of the buyer of the logs or the resulting lumber by a contract logger or sawmill owner are not within the scope of agriculture unless it can be shown that these logging or sawmill operations are clearly incidental to farming operations on the farm on which the logging or sawmill operations are being conducted. For example, the clearing of additional land for cultivation by the farmer or the preparation of timber for construction of his farm buildings would appear to constitute operations incidental to "such farming operations."

§ 780.204 Number of employees engaged in operations not material.

The fact that the employer employs fewer than a certain number of employees in forestry and lumbering operations does not provide a basis for their being considered as agricultural employees. This is to be distinguished from the exemption provided by section 13(a)(13) (discussed in Part 788 of this chapter) which is limited to employers employing not more than eight employees in the forestry or logging operations described therein.

NURSERY AND LANDSCAPING OPERATIONS

§ 780.205 Nursery activities generally.

The employees of a nursery who are engaged in the following activities are employed in "agriculture":

(a) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees (but not Christmas trees), and shrubs, vines, and flowers;

(b) Handling such plants from propagating frames to the field;

(c) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

§ 780.206 Planting and lawn mowing.

(a) The planting of trees and bushes is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities, or where it constitutes a practice performed by a farmer or on a farm as an incident to or in conjunction with farming operations (as where it is part of the subordinate marketing operations of the grower of such trees or bushes). Thus, employees of the nurseryman who raised such nursery stock are doing agricultural work when they plant the stock on private or public property, trim, spray, brace, and treat the planted stock, or perform other duties incidental to its care and preservation. Similarly, employees who plant fruit trees and berry stock not raised by their employer would be considered as engaged in agriculture if the planting is done on a farm as an incident to or in conjunction with the farming operation on that farm.

(b) On the other hand, the planting of trees and bushes on residential, business, or public property is not agriculture when it is done by employees of an employer who has not grown the trees and bushes, or who, if he has grown them, engages in the planting operations as an incident, not to his farming operations, but to landscaping operations which include principally the laying of sod and the construction of pools, walks, drives, and the like.

(c) The mowing of lawns, except where it can be considered incidental to farming operations, is not agricultural work.

§ 780.207 Operations with respect to wild plants.

Nurseries frequently obtain plants growing wild in the woods or fields which are to be further cultivated by the nursery before they are sold by it. Obtaining such plants is a practice which is incidental to farming operations. The activities are therefore within the scope of agriculture if performed by a farmer or on a farm. Thus, employees of the nursery are engaged in agriculture when performing these activities. On the other hand, employees of an independent contractor performing these activities off the farm would not be engaged in agriculture. The transplanting of such wild plants in the nursery is performed "on a farm" and is an agricultural activity whether performed by employees of an independent contractor or by employees of the nursery.

§ 780.208 Forest and Christmas tree activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. The planting, tending, and cutting of Christmas trees do not constitute farming operations. If such operations on forest products are within section 3(f), they must qualify under the second part of the definition dealing with incidental practices. (See § 780.201.)

§ 780.209 Packing, storage, warehousing, and sale of nursery products.

Employees of a grower of nursery stock who work in packing and storage sheds sorting the stock, grading and trimming it, racking it in bins, and packing it for shipment are employed in "agriculture" provided they handle only products grown by their employer and their activities constitute an established part of their employer's agricultural activities and are subordinate to his farming operations. Such employees are not employed in agriculture when they handle the products of other growers (Mitchell v. Huntsville Nurseries, 267 F. 2d 286; Jordan v. Stark Bros. Nurseries & Orchards Co., 45 F. Supp. 769). Agricultural activities would typically include employees engaged in the balling and storing of shrubs and trees grown in the nursery. Where a grower of nursery stock operates, as a separate enterprise, a processing establishment or an establishment for the wholesale of retail distribution of such commodities, the employees in such separate enterprise are not engaged in agriculture (see Walling v. Rocklin, 132 F. 2d 3; Mitchell v. Huntsville Nurseries, 267 F. 2d 286). Although the handling and the sale of nursery commodities by the grower at or near the place where they were grown may be incidental to his farming operations, the character of these operations changes when they are performed in an establishment set up as a marketing point to aid the distribution of those products.

HATCHERY OPERATIONS

§ 780.210 The typical hatchery operations constitute "agriculture."

As stated in § 780.127, the typical hatchery is engaged in "agriculture," whether in a rural or city location. Where the hatchery is engaged solely in procuring eggs for hatching, performing the hatching operations, and selling the chicks, all the employees including office and maintenance workers are engaged in agriculture (see Miller Hatcheries v. Boyer, 131 F. 2d 283).

§ 780.211 Contract production of hatching eggs.

It is common practice for hatcherymen to enter into arrangements with farmer poultry raisers for the production of hatching eggs which the hatchery agrees to buy. Ordinarily, the farmer furnishes the facilities, feed and labor and the hatchery furnishes the basic stock of poultry. The farmer undertakes a specialized program of care and improvement of the flock in cooperation with the hatchery. The hatchery may at times have a surplus of eggs, including those suitable for hatching and culled eggs which it sells. Activities such as grading and packing performed by the hatchery employees in connection with the disposal of these eggs, are an incident to the breeding of poultry by the hatchery and are within the scope of agriculture.

§ 780.212 Hatchery employees working on farms.

The work of hatchery employees in connection with the maintenance of the quality of the poultry flock on farms is also part of the "raising" operations. This includes testing for disese, culling, weighing, cooping, loading, and transporting the culled birds. The catching and loading of broilers on farms by hatchery employees for transportation to market are agricultural operations.

§ 780.213 Produce business.

In some instances, hatcheries also engage in the produce business as such and commingle with the culled eggs and chickens other eggs and chickens which they buy for resale. In such a case that work which relates to both the hatchery and produce types of activities would not be within the scope of agriculture.

§ 780.214 Feed sales and other activities.

In some situations, the hatchery also operates a feed store and furnishes feed to the growers. As in the case of the produce business operated by a hatchery, this is not an agricultural activity and employees engaged therein, such as truckdrivers hauling feed to growers, are not agricultural employees. Also office workers and other employees are not employed in agriculture when their duties relate to nonagricultural activities.

Subpart D—Employment in Agriculture That Is Exempted From the Minimum Wage and Overtime Pay Requirements Under Section 13(a)(6)

STATUTORY PROVISIONS

§ 780.300 Statutory exemptions in section 13(a)(6).

Section 13(a)(6) of the Act exempts from the minimum wage requirements of section 6 and from the overtime pay requirements of section 7:

> Any employee employed in agriculture: (A) If such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than 13 weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age 16 are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock.

§ 780.301 Other pertinent statutory provisions.

(a) Man-day is defined by section 3(u) of the Act as follows:

"Man-day" means any day during which an employee performs any agriculture labor for not less than 1 hour.

(b) Under section 3(e) of the Act the term employee does not include certain individuals in determining man-days of labor. Section 3(e) provides that:

> "Employee" includes any individual employed by an employer, except that such term shall not, for the purposes of section 3(u) include—
>
> (1) Any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family, or
>
> (2) Any individual who is employed by an employer engaged in agriculture if such individual (A) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment, and (B) commutes daily from his permanent residence to the farm on which he is so employed, and (C) has been employed in agriculture less than 13 weeks during the preceding calendar year.

(c) The legislative history of the 1966 amendments to the Fair Labor Standards Act indicates that the Congress in enacting minimum wage protection (section 6(a)(5)) for agriculture workers for the first time sought to provide a minimum wage floor for the farmworkers on large farms or agribusiness enterprises. The section 13(a)(6)(A) exemption was intended to exempt those farmworkers on the smaller or familysize farms. In keeping with this intention, a labor requirement of 500 man-days was incorporated into the exemption, and certain workers were specifically excluded from the man-day count, as provided in section 3(e) (1) and (2).

§ 780.302 Basic conditions of section 13(a)(6)(A).

Section 13(a)(6)(A) applies to an employee provided all the following conditions are met:

(a) He must be "employed in agriculture"

(b) By an "employer"

(c) Who did not use more than "500 man-days" of agriculture labor

(d) During any "calendar quarter of the preceding calendar year."

The following sections discuss the meaning and application of these requirements.

§ 780.303 Exemption applicable on employee basis.

Section 13(a)(6)(A) exempts "any employee employed in agriculture * * * by an employer * * *." It is clear from this language that it is the activities of the employee rather than those of his employer which determine the application of the exemption. In other words, the exemption applies only to employees who are engaged in agricultural activities. Thus some employees of the employer may be exempt while others may not. In any case the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer. For a more detailed discussion of what constitutes employment in agriculture, see Subpart B of this part.

§ 780.304 "Employed by an employer."

(a) The employer may be an individual, a partnership, or a corporation. It is not necessary that the employer be a farmer as defined in § 780.131. It is sufficient that he "uses" agricultural labor.

(b) In applying this exemption, one of the main criteria is the number of man-days of agricultural labor used by the employer. Section 13(a)(6)(A) provides that the exemption shall not apply to an employee employed in agriculture "if such employee is employed by an employer who did not * * * use more than 500 man-days of agricultural labor * * *." From this language of the statute, the man-days of all agricultural workers, unless specifically excluded, of an employer whether he be the owner of a single farm, the owner of an enterprise consisting of several farms, a tenant farmer, an independent contractor, etc., are to be counted for purposes of section 13(a)(6)(A) whether they are employed at one place or several widely scattered places. For example if an employer owns and operates two farms, it is the total number of man-days used on both farms and not that used on each individual farm that determines whether he meets the 500 man-day test. Likewise independent contractor who harvests crops on different farms during the harvesting season must total all the man-days of agricultural labor used on all such farms except those excludable under section 3(e) in determining whether he meets the 500 man-day test.

§ 780.305 500 man-day provision.

(a) Section 3(u) of the Act defines "man-day" to mean "any day during which an employee performs agricultural labor for not less than 1 hour." 500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter. However, a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.

(b) All of the employer's employees who are engaged in "agricultural labor" except those specifically excluded by section 3(e) (see § 780.301) and those exempt under section 13(a)(14) (see Subpart F of this part) must be counted in determining whether the 500 man-day test is met. This is true even though an employee may be exempt from the monetary provisions under another section of the Act. For example, a general manager of a farm may be an exempt executive employee under section 13(a)(1) or a sheepherder may meet the requirements of section 13(a)(6)(E). Regardless of those exemptions, their man-days of employment would be included in the man-day count of the employer.

(c) A farmer whose crops are harvested by an independent contractor is considered to be a joint employer with the contractor who supplies the harvest hands if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment for the harvest hands. (See § 780.331.) Each employer must include the contractor's employees in his man-day count in determining whether his own man-day test is met. Each employer will be considered responsible for compliance with the minimum wage and child labor requirements of the Act with respect to the employees who are jointly employed.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27520, Oct. 4, 1973]

§ 780.306 Calendar quarter of the preceding calendar year defined.

In applying section 13(a)(6)(A), it is necessary to consider each of the four calendar quarters (January 1-March 31; April 1-June 30; July 1-September 30; October 1-December 31) in the preceding calendar year (January 1-December 31). If in any calendar quarter of the preceding calendar year the employer used more than 500 man-days of agricultural labor, he must comply with the minimum wage requirements of section 6(a)(5) with respect to any employee not otherwise exempt in the current year. Compliance with the Act is required in the current year regardless of the number of man-days of agricultural labor used in the current year. On the other hand, if in the preceding calendar year the number of man-days used did not exceed 500 in any calendar quarter, there is no requirement to comply with respect to employment of agricultural labor in the current calendar year regardless of how many man-days are used in any calendar quarter of the current calendar year. Such employees are exempt under the basic provisions of section 13(a)(6)(A).

§ 780.307 Exemption for employer's immediate family.

Section 13(a)(6)(B) of the Fair Labor Standards Amendments of 1966 provides a minimum wage and overtime exemption in the case of "any employee engaged in agriculture * * * if such employee is the parent, spouse, child, or other member of the employer's immediate family." The requirements of this exemption, evident from the statutory language, are that the employee be employed in agriculture and that he be a close blood relative, spouse or member of the employer's immediate family. Reference is made to Subpart B of this part as to what constitutes employment in agriculture. The section 13(a)(6)(B) exemption applies to such an individual even though he is employed by an employer who otherwise used more than 500 man-days of agricultural labor in a calendar quarter of the preceding calendar year, as discussed in § 780.305.

§ 780.308 Definition of immediate family.

The Act does not define the scope of "immediate family." Whether an individual other than a parent, spouse or child will be considered as a member of the employer's immediate family, for purposes of sections 3(e)(1) and 13(a)(6)(b), does not depend on the fact that he is related by blood or marriage. Other than a parent, spouse or child, only the following persons will be considered to qualify as part of the employer's immediate family: Stepchildren, foster children, step-parents and foster parents. Other relatives, even when living permanently in the same household as the employer, will not be considered to be part of the "immediate family."

[38 FR 17726, July 3, 1973]

§ 780.309 Man-day exclusion.

Section 3(e)(1) specifically excludes from the employer's man-day total (as defined in section 3(u)) employees who qualify for exemption under section 13(a)(6)(B). See § 780.301. This man-day count is a basic factor in the application of the section 13(a)(6)(A) exemption. See § 780.302 et seq.

§ 780.310 Exemption for local hand harvest laborers.

Section 13(a)(6)(C) was added to the Act by the Fair Labor Standards Amendments of 1966. The legislative history of the exemption indicates that it was intended to apply to the local worker who goes out on a temporary basis during the harvest season to harvest crops. The exemption was not intended to apply to a full-time farmworker, that is, one who earns a livelihood at farming. For instance, migrant laborers who travel from farm to farm were not intended to be within the scope of this exemption.

§ 780.311 Basic conditions of section 13(a)(6)(C).

(a) Section 13(a)(6)(C) of the Act applies to an employee who:

(1) Is employed in agriculture.

(2) Is employed as a hand harvest laborer.

(3) Is paid on a piece-rate basis.

(4) Is paid piece-rates in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment.

(5) Commutes daily from his permanent residence to the farm on which he is so employed.

(6) Has been employed in agriculture less than 13 weeks during the preceding calendar year.

(b) In order for the exemption to apply to an employee, all of the requirements must be met. Since a hand harvest laborer is normally an agricultural worker, while so engaged, such an employee would meet the basic requirements that he be employed in agriculture. Subpart B of this part contains a more detailed discussion of what constitutes employment in agriculture. The meaning and application of the remaining requirements are discussed in the following sections.

§ 780.312 "Hand harvest laborer" defined.

(a) The term hand harvest laborer for purposes of this exemption refers to farm workers engaged in harvesting by hand, or with hand tools, soil grown crops such as cotton, tobacco, grains, fruits, and vegetables. The term would not include harvesting operations performed by an employee with an electrically powered mechanical device, such as a "blueberry picking tool." "Hand-harvesting" refers only to soil-grown crops and does not include any operation involving animals, such as shearing or lambing of sheep and catching chickens. Hand-harvesting is defined as manually gathering or severing the crop from the soil, stems, or roots at its growing position in the fields. Included are integral related operations, closely related geographically and in point of time, which are performed before the transportation to concentration points on the farm.

For example:

(1) Employees who take tobacco leaves from the pickers and string them on poles by hand qualify as "hand harvest laborers"

because the stringing operation is performed in the field almost simultaneously with the picking and before transportation to the concentration point on the farm (drying shed).

(2) The picking up of tomatoes by hand after hand pulling from the vines is "hand-harvesting," as it is performed where the crop is severed and prior to its transportation to the packing shed.

(b) The definition is limited to harvesting, and the performance by the hand harvester of any nonharvesting operation in the same workweek would cause the loss of the section 13(a)(6)(C) exemption.

For example:

(1) Employees who wrap tomatoes in a packing shed would not qualify, as the wrapping is a nonharvesting operation. (Schultz v. Durrence (S.D. Ga.) 63 CCH. Lab. Cas. 32,387; 19 W.H. Cases 747.)

(2) Employees who hand pick small undesirable fruit prior to harvesting in order to insure a better crop would not qualify for the exemption. This is a preharvest culling operation performed as a part of the cultivation and growing operations not harvesting.

(3) Employees who chop cotton, since this is a nonharvesting operation.

§ 780.313 Piece rate basis.

The exemption provides that the employee must be paid on a piece-rate basis. To be exempt the employee must be compensated solely on piece rates during the workweek. The exemption does not apply in any workweek in which the employee is compensated on any other basis. For example, if an employee is compensated on an hourly rate for part of the week and on a piece rate for part of the week, the exemption would not be available. Also, if any pieceworker who is otherwise subject to the minimum wage provisions of the Act does not meet all the requirements set forth in this section he must be paid at least the minimum wage for each hour worked in a particular workweek, regardless of the fact he is paid on piece rate unless he is exempted by some other provision of the Act.

§ 780.314 Operations customarily * * * paid on a piece rate basis * * *

A significant test of the exemption is that the hand harvest operation "has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment." The legislative history is silent on who must customarily and generally recognize the hand harvest operation as having been paid on a piece rate basis. However, considering the context in which the term is used, such recognition must be on the part of agricultural employers and employees and other individuals in the region of employment who are familiar with farming operations and practices in the region and the method of compensation utilized in such operations and practices.

§ 780.315 Local hand harvest laborers.

(a) A requirement of the exemption is that an employee must commute each day from his permanent residence to the farm where he is employed. Thus, the exemption does not apply to a migrant worker who travels to different areas of the country during the harvesting seasons. This would be true even though the worker may remain in the area for a considerable period of time. On the other hand, if a migrant worker actually changes his place of residence and thereafter commutes daily from his permanent residence, the exemption applies from the date of the change of residence if the other tests are met.

(b) The fact that a worker may live on the farm where the operations are performed would not be a reason for disqualification. For example, if the other tests for the exemption are met, members of a tractor driver's family who reside on the farm could be employed in picking cotton within the terms of the exemption. Such family members would be considered to be commuting daily from their permanent residence despite the fact that their residence may be located on the farm at which they are employed.

§ 780.316 Thirteen week provision.

(a) The exemption provides that an "employee must have been employed in agriculture less than 13 weeks during the preceding calendar year." For purposes of determining whether a worker has been employed in agriculture less than 13 weeks during the preceding calendar year, a week is considered to be a fixed and regularly recurring period of 168 hours consisting of seven consecutive 24-hour periods during which the employee worked at least 1 "man-day." Section 3(u) of the Act defines a man-day as "any day during which an employee performs any agricultural labor for not less than 1 hour."

(b) In defining the term "week" in this manner for purposes of section 13(a)(6)(C) (as well as section 3(e)(2)) comports with the traditional definition of week used in administering all the other provisions of the law. On this basis, the phrase "employed in agriculture less than 13 weeks" means that an employee has spent less than 13 weeks in agricultural work, regardless of the number of hours he worked during each one of the 13 weekly units. This position recognizes and accommodates to situations where an employee works very long as well as very short hours during the week. This would accord with the legislative history of this exemption which clearly indicates that it was meant to apply only to temporary workers whose hours of work would undoubtedly vary in length, and would, thereby effectuate the legislative intent.

(c) In determining the 13-week period, not only that work for the current employer in the preceding calendar year is counted, but also that agricultural work for all employers in the previous year. It is the total of all weeks of agricultural employment by the employee for all employers in the preceding calendar year that determines whether he meets the 13-week test. In this respect a self-employed farmer who works as a hand harvest laborer during part of the year is considered to be "employed" in agriculture only during those weeks when he is an employee of other farmers. Thus, such weeks of employment are to be counted but any weeks when he works only for himself are not counted toward the 13 weeks.

(d) The 13-week test applies to each individual worker. It does not apply on a family basis. To carry the example in the preceding section further, members of a tractor driver's family who reside on the farm could be employed in picking cotton within the terms of the exemption even though the driver had been employed in agriculture as much as 13 weeks in the previous calendar year, so long as the family members themselves had not.

(e) If an employer claims this exemption, it is the employer's responsibility to obtain a statement from the employee showing the number of weeks he was employed in agriculture during the preceding calendar year. This requirement is contained in the recordkeeping regulations in § 516.33(d) of this chapter.

§ 780.317 Man-day exclusion.

Section 3(e)(2) specifically excludes from the employer's man-day total (as defined in section 3(u)) employees who qualify for exemption under section 13(a)(6)(C). (See § 780.301.) This man-day count is a basic factor in the application of the section 13(a)(6)(A) exemption. (See § 780.302 et seq.)

§ 780.318 Exemption for nonlocal minors.

(a) Section 13(a)(6)(D) of the 1966 Amendments to the Fair Labor Standards Act exempts from the minimum wage and overtime provisions "any employee employed in agriculture * * * if such employee (other than an employee described in clause (C) of this subsection) (1) is 16 years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (2) is employed on the same farm as his parent of persons standing in the place of his parent, and (3) is paid at the same piece rate as employees over age 16 are paid on the same farm."

(b) It is clear from the legislative history of the amendments that the exemption was intended to apply, where the other specific tests are met, only to minors 16 years of age or under who are not "local" in the sense that they are away from their permanent home when employed in agriculture. Specifically the exemption was intended to apply in the case of the children of migrants who typically accompany their parents in harvesting and other agricultural work. (S. Rept. No. 1487, 89th Cong., second sess., to accompany H.R. 13712, pp. 9 and 10)

§ 780.319 Basic conditions of exemption.

(a) Section 13(a)(6)(D) applies to an employee engaged in agriculture who meets all of the following tests:

(1) Is not a local hand harvest laborer,

(2) Is 16 years of age or under,

(3) Is employed as a hand harvest laborer,

(4) Is paid on a piece rate basis,

(5) Is employed in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment,

(6) Is employed on the same farm as his parent or person standing in the place of his parent, and

(7) Is paid at the same piece rate as employees over age 16 are paid on the same farms.

(b) Some of these requirements which are common to both sections 13(a)(6)(C) and 13(a)(6)(D) have already been discussed in connection with section 13(a)(6)(C) and need not be repeated. They are found in §§ 780.311 (employed in agriculture), 780.312 (hand harvest laborer), 780.313 piece rate basis), and § 780.314 (operations * * * customarily paid on a piece rate basis). The other requirements are discussed in the following sections.

§ 780.320 Nonlocal minors.

The exemption applies only to migrant or other than local hand harvest workers 16 years of age or under who do come within the scope of section 13(a)(6)(C) (application to all local hand harvest laborers who commute daily from their permanent residences). (See § 780.315.) A local youth under the prescribed age who commutes daily from his permanent residence to the farm to perform work is not exempt under section 13(a)(6)(D). The exemption may, however, be available for the specified minors who work for short periods of several days or weeks without returning daily to their homes on farms beyond commuting distances from their permanent homes.

§ 780.321 Minors 16 years of age or under.

Section 13(a)(6)(D) by its very terms is available only to employees 16 years of age or under. Accordingly, even though all the other tests of the exemption are met, the exemption is inapplicable in the case of an employee over 16 years of age and the employer must pay to such an employee the applicable statutory minimum wage unless his operations come within the reach of some other exemption, such as section 13(a)(6)(A). Furthermore, although section 13(a)(6)(D) provides a minimum wage and overtime exemption for minors 16 years of age or under, the employer must nevertheless comply with the child labor provisions of the Act prohibiting the employment of minors in agriculture except under certain conditions and circumstances. These provisons are discussed in Part 1500, Subpart G of this title.

§ 780.322 Is employed on the same farm as his parent or persons standing in the place of his parent.

(a) The words "employed on the same farm" are accorded their natural meaning with the usual caution, however, that as in the case of all other exemptions, the exemptive language is to be construed narrowly. (See § 780.2.)

(b) Individuals who are considered as "his parent or persons standing in place of his parent" include natural parents, or any other person where the relationship between that person and a child is such that the person may be said to stand in place of a parent. For example, one who takes a child into his home and treats it as a member of his own family, educating and supporting the child as if it were his own, is generally said to stand to the child in place of a parent.

§ 780.323 Exemption for range production of livestock.

Section 13(a)(6)(E) which was added to the Act by the Fair Labor Standards Amendments of 1966 provides an exemption from the minimum wage and overtime requirements of the Act for any employee "employed in agriculture" if he is "principally engaged in the range production of livestock." It is apparent from the language of section 13(a)(6)(E) that the application of this exemption depends on the type of work performed by the individual employee for whom exemption is sought and on where the work is done. A determination of whether an employee is exempt therefore requires an examination of that employee's duties and where they are performed. Some employees of the employer may be exempt while others may not.

§ 780.324 Requirements for the exemption to apply.

(a) All the following conditions must be met in order for the exemption to apply to an employee:

(1) He must be "engaged in agriculture";

(2) Be "principally engaged";

(3) On the "range", and

(4) In the "production of livestock."

(b) Since the raising of livestock is included in the definition of agriculture under section 3(f) of the Act (see §§ 780.119-780.121 of Subpart B of this part), the range production of livestock would normally be deemed agriculture work, and, consequently, an employee, during this time he is engaged in such activities, would meet the basic requirement of the exemption that he be "employed in agriculture."

The following sections discuss the meaning and application of the other requirements.

§ 780.325 Principally engaged.

(a) To determine whether an employee is "principally engaged" in the range production of livestock, one must consider the nature of his duties and responsibilities. To qualify for this exemption the primary duty and responsibility of a range employee must be to take care of the animals actively or to stand by in readiness for that purpose. A determination of whether an employee has range production of livestock as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the range production duties is a useful guide in determining whether this is the primary duty of the employee. In the ordinary case it will be considered that the primary duty means the major part, or over 50 percent, of the employee's time.

(b) Under this principle, an employee who spends more than 50 percent of his time during the year on the range in the duties designated as range production duties would be exempt. This is true even though the employee may perform some activities not directly related to the range production of livestock, such as putting up hay or constructing dams or digging irrigation ditches.

§ 780.326 On the range.

(a) For purposes of this exemption, "range" is defined generally as land that is not cultivated. It is land that produces native forage for animal consumption, and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation. "Forage" as used here means "browse" or herbaceous food that is available to livestock or game animals.

(b) The range may be on private or Federal or State land, and need not be open. Typically it is not only noncultivated land, but land that is not suitable for cultivation because it is rocky, thin, semiarid, or otherwise poor. Typically, also, many acres of range land are required to graze one animal unit (five sheep or one cow) for 1 month. By its nature, range production of livestock is most typically conducted over wide expanses of land, such as thousands of acres.

§ 780.327 Production of livestock.

For an employee to be engaged in the production of livestock, he must be actively taking care of the animals or standing by in readiness for that purpose. Thus, such activities as herding, handling, transporting, feeding, watering, caring for, branding, tagging, protecting, or otherwise assisting in the raising of livestock and in such immediately incidental duties as inspecting and repairing fences, wells, and windmills would be considered as the production of livestock. On the other hand, such work as terracing, reseeding, haying, and constructing dams, wells, and irrigation ditches would not be considered as the production of livestock within the meaning of the exemption.

§ 780.328 Meaning of livestock.

The term "livestock" includes cattle, sheep, horses, goats, and other domestic animals ordinarily raised or used on the farm. This is further discussed in § 780.120. Turkeys or domesticated fowl are considered poultry and not livestock within the meaning of this exemption.

§ 780.329 Exempt work.

(a) The standard that must be used to determine whether the individual employee is exempt is that his primary duty must be the range production of livestock and that this duty necessitates his constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult. The fact that an employee generally returns to his place of residence at the end of each day would not affect the application of the exemption.

(b) Thus, exempt work must be performed away from the "headquarters." The headquarters is not, however, to be confused with the "headquarters ranch." The term headquarters has reference to the place for the transaction of the business of the ranch (administrative center), as distinguished from buildings or lots used for convenience elsewhere. It is a particular location for the discharge of the management duties. Accordingly, the term "headquarters" would not embrace large acreage, but only the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The balance of the "headquarters ranch" would be the "range."

(c) Furthermore, the legislative history indicates that this exemption was not intended to apply to feed lots or to any area where the stock involved would be near headquarters. Its sponsors stated that the exemption would apply only to those employees principally engaged in activities which require constant attendance on a standby basis, away from headquarters, such as herding, where the computation of hours worked would be extremely difficult. Such constant surveillance of livestock that graze and reproduce on range lands is necessary to see that the animals receive adequate care, water, salt, minerals, feed supplements, and protection from insects, parasites, disease, predators, adverse weather, etc.

(d) The man-days of labor of employees principally engaged in the range production of livestock, even though the employees are exempt from the wage and hour requirements of the Act, are included in the employer's man-day count for purposes of application of section 13(a)(6)(A). Thus, if a cattle rancher in a particular calendar quarter uses 200 man-days of such range production labor and 400 man-days of agricultural labor performed by individuals not so engaged, he is required to pay the minimum wage to the latter employees in the following year.

§ 780.330 Sharecroppers and tenant farmers.

(a) The test of coverage for sharecroppers and tenant farmers is the same as that applied under the Act to determine whether any other person is an employee or not. Certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent are covered. Those individuals called sharecroppers and tenants whose work is closely directed and who have no actual discretion in controlling farm operations are in fact employees by another name. True independent-contractor sharecroppers or tenant farmers who actually control their farm operations are not employees, but if they employ other workers they may be responsible as employers under the Act.

(b) In determining whether such individuals are employees or independent contractors, the criteria laid down by the courts in interpreting the Act's definitions of employment, such as those enunciated by the Supreme Court in Rutherford Food Corporation v. McComb, are utilized. This case, as well as others, made it clear that the answer to the question of whether an individual is an employee or an independent contractor under the definitions in this Act lies in the relationship in its entirety, and is not determined by common law concepts. It does not depend upon isolated factors but on the "whole activity." An employee is one who as a matter of economic reality follows the usual path of an employee. Each case must be decided on the basis of all facts and circumstances, and as an aid in the assessment, one considers such factors as the following: (1) The extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the opportunities for profit or loss; (4) the initiative, judgment, or foresight exercised by the one who performs the services; (5) the amount of investment; and (6) the degree of control which the principal has in the situation.

(c) Where a tenant or sharecropper is found to be an employee, he and any members of his family who work with him on the crop are also to be included in the 500 man-day count of the owner or operator of the farm. Thus, where a sharecropper is an employee and his wife and children help in chopping cotton, all the family members are employees of the farm owner or operator and all their man-days of work are counted.

(d) On the other hand, a sharecropper or tenant who qualifies as a bona fide independent contractor is considered the same as any other employer, and only the man-days of agricultural labor performed by employees of such a sharecropper or tenant are counted toward the man-days used by him. If he does not meet the 500 man-day test, he is not required to pay his employees the minimum wage even though those employees are entitled to the minimum wage when working for a separate employer who met the man-day test.

§ 780.331 Crew leaders and labor contractors.

(a) Whether a crew leader or a labor contractor is the employer of the workers he supplies is a question of fact. The tests here are the same as those used to determine whether a sharecropper or tenant is an independent contractor. A crew leader who merely assembles a crew and brings them to the farm to be supervised and paid directly by the farmer, and who does the same work and receives the same pay as the crewmembers, is an employee of the farmer, and both he and his crew are counted as such and paid accordingly if the farmer is not exempt under the 500 man-day test. The situation is not significantly different if under the same circumstances, the crew is hired at so much per acre for their work. This is in effect a group piecework arrangement.

(b) The situation is different where the farmer only establishes the general manner for the work to be done. Where this is the case, the labor contractor is the employer of the workers if he makes the day-to-day decisions regarding the work and has an opportunity for profit or loss through his supervision of the crew and its output. As the employer, he has the authority to hire and fire the workers and direct them while working in the fields. Complaints by the farmer about the quality or quantity of the work or about a worker are made to the contractor or his representatives, who takes whatever action he deems appropriate. His opportunity for profit or loss comes from his control over the time and manner of performance of work by his crew and his authority to determine the wage rates paid to his workers.

(c) There is also the common and general practice of an individual who performs custom work such as crop dusting or grain harvesting and threshing or sheepshearing. In the typical case this contractor has a substantial investment in equipment and his business decisions and judgments materially affect his opportunity for profit or loss. In the overall picture, the contractor is not following the usual path of an employee, but that of an independent contractor.

For example: A sheepshearing contractor who operates in the following manner is considered an independent contractor and therefore an agricultural employer in his own right—he operates his own equipment including power supply from his own trucks or trailers, boards his shearing crew and has complete responsibility for their work and compensation, has complete charge of the sheep from the time they enter the shearing pen until they are shorn and turned out, and contracts with the rancher for the complete operation at an agreed rate per head.

(d) Whether or not a labor contractor or crew leader is found to be a bona fide independent contractor, his employees are considered jointly employed by him and the farmer who is using their labor if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment. (Hodgson v. Okada (C.A. 10), 20 W.H. Cases 1107; Hodgson v. Griffin & Brand (C.A. 5) 20 W.H. Cases 1051; Mitchell v. Hertzke, 234 F. 2d 183, 12 W.H. Cases 877 (C.A. 10).) In a joint employment situation, the man-days of agricultural labor rendered are counted toward the man-days of such labor of each employer. Each employer is considered equally responsible for compliance with the Act. With respect to the recordkeeping regulations in 29 CFR 516.33, the employer who actually pays the employees will be considered primarily responsible for maintaining and preserving the records of hours worked and employees' earnings specified in paragraph (c) of § 516.33 of this chapter.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27521, Oct. 4, 1973]

§ 780.332 Exchange of labor between farmers.

(a) Occasionally a farmer may help his neighbor with the harvest of his crop. For instance, Farmer B helps his neighbor Farmer A harvest his wheat. In return Farmer A helps Farmer B with the harvest at his farm.

(b) In a case where neighboring farmers exchange their own work under an arrangement where the work of one farmer is repaid by the labor of the other farmer and there is no monetary compensation for these services paid or contemplated, the Department of Labor would not assert that either farmer is an employee of the other.

(c) In addition, there may be instances where employees of a farmer also work for neighboring farmers during harvest time. For example, employees of Farmer A may help Farmer B with his harvest, and later, Farmer B's employees may help Farmer A. These employees would be included in the man-day count of the farmer for whom the work is performed on the day in question. Since the Act defines man-day to mean any day during which an employee performs any agricultural labor for not less than 1 hour, there may be days on which these employees work for both Farmer A and Farmer B for a "man-day." In that event they would be included for that day in the man-day count of both Farmer A and Farmer B.

Subpart E—Employment in Agriculture or Irrigation That Is Exempted From the Overtime Pay Requirements Under Section 13(b)(12)

§ 780.400 Statutory provisions.

Section 13(b)(12) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes.

§ 780.401 General explanatory statement.

(a) Section 13(b)(12) of the act contains the same wording as did section 13(a)(6) prior to the 1966 amendments. The effect of this is to provide a complete overtime exemption for any employee employed in "agriculture" who does not qualify for exemption under section 13(a)(6) (A), (B), (C), (D), and (E) of the 1966 amendments.

(b) In addition to exempting employees employed in agriculture, section 13(b)(12) also exempts from the overtime provisions of the act employees employed in specified irrigation activities. Prior to the 1966 amendments these employees were exempt from the minimum wage and overtime pay requirements of the act.

(c) For exempt employment in "agriculture," see Subpart B of this part.

§ 780.402 The general guides for applying the exemption.

(a) Like other exemptions provided by the Act, the section 13(b)(12) exemption is narrowly construed (Phillips, Inc. v. Walling, 334 U.S. 490; Bowie v. Gonzalez, 117 F. 2d 11; Calaf v. Gonzalez, 127 F. 2d 934; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Fleming v. Swift & Co., 41 F. Supp. 825; Miller Hatcheries v. Boyer, 131 F. 2d 283; Walling v. Friend, 156 F. 2d 429; see also § 780.2 of Subpart A of this Part 780). An employer who claims the exemption has the burden of showing that it applies. (See § 780.2) The section 13(b)(12) exemption for employment in agriculture is intended to cover all agriculture, including "extraordinary methods" of agriculture as well as the more conventional ones and large operators as well as small ones. Nevertheless, it was meant to apply only to agriculture. It does not extend to processes that are more akin to manufacturing than to agriculture. Practices performed off the farm by nonfarmers are not within the exemption, except for the irrigation activities specifically described in section 13(b)(12). Practices performed by a farmer do not come within the exemption for agriculture if they are neither a part of farming nor performed by him as an incident to or in conjunction with his own farming operations. These principles have been well established by the courts in such cases as Mitchell v. Budd, 350 U.S. 473; Maneja v. Waialua, 349 U.S. 254; Farmers Reservoir Co. v. McComb, 337 U.S. 755; Addison v. Holly Hill Fruit Products, 322 U.S. 607; Calaf v. Gonzalez, 127 F. 2d 934; Chapman v. Durkin, 214 F. 2d 363, certiorari denied, 348 U.S. 897; McComb v. Puerto Rico Tobacco Marketing Co-op. Ass'n. 80 F. Supp. 953, 181 F. 2d 697.

(b) When the Congress, in the 1961 amendments, provided special exemptions for some activities which had been held not to be included in the exemption for agriculture (see Subparts F and J of this Part 780), it was made very clear that no implication of disagreement with "the principles and tests governing the application of the present agriculture exemption as enunciated by the courts" was intended (Statement of the Managers on the Part of the House, Conference Report, H. Rept. No. 327, 87th Cong. first sess., p. 18). Accordingly, an employee is considered an exempt agricultural or irrigation employee if, but only if, his work falls clearly within the specific language of section 3(f) or section 13(b)(12).

§ 780.403 Employee basis of exemption under section 13(b)(12).

Section 13(b)(12) exempts "any employee employed in * * *." It is clear from this language that it is the activities of the employee rather than those of his employer which ultimately determine the application of the exemption. Thus the exemption may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities. But the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer.

§ 780.404 Activities of the employer considered in some situations.

Although the activities of the individual employee, as distinguished from those of his employer, constitute the ultimate test for applying the exemption, it is necessary in some instances to examine the activities of the employer. For example, in resolving the status of the employees of an irrigation company for purposes of the agriculture exemption, the U.S. Supreme Court, found it necessary to consider the nature of the employer's activities (Farmers Reservoir Co. v. McComb, 337 U.S. 755).

THE IRRIGATION EXEMPTION

§ 780.405 Exemption is direct and does not mean activities are agriculture.

The exemption provided in section 13(b)(12) for irrigation activities is a direct exemption which depends for its application on its own terms and not on the meaning of "agriculture" as defined in section 3(f). This exemption was added by an amendment to section 13(a)(6) in 1949 to alter the effect of the decision of the U.S. Supreme Court in Farmers Reservoir Company v. McComb, 337 U.S. 755, so as to exclude the type of employees involved in that case from certain requirements of the Act. Congress chose to accomplish this result, not by expanding the definition of agriculture in section 3(f), but by adding a further exemption. In view of this approach, it can well be said that Congress agreed with the Supreme Court's holding that such workers are not employed in agriculture. (Goldberg v. Crowley Ridge Assn., 295 F. 2d 7.) Irrigation workers who are employed in any workweek exclusively by a farmer or on a farm in irrigation work which meets the requirement of performance as an incident to or in conjunction with the primary farming operations of such farmer or such farm, as previously explained, are considered as employed in agriculture under section 3(f) and may qualify for the minimum wage and overtime exemption under section 13(a)(6) or for the overtime exemption provided agricultural workers under section 13(b)(12). Where they are not so employed, they are not considered as agricultural workers (Farmers Reservoir Co. v. McComb, supra), but may qualify for the overtime exemption under section 13(b)(12) relating to irrigation work if their duties and the irrigation system on which they work come within the express language of the statute. Where this is the case, it is not material whether the employees are employed in agriculture.

§ 780.406 Exemption is from overtime only.

This exemption applies only to the overtime provisions of the Act and does not affect the minimum wage, child labor, recordkeeping, and other requirements of the Act. The minimum wage rate applicable to employees employed in connection with supplying and storing water for agricultural purposes whose exemption from the minimum wage requirements was removed by the 1966 amendments is that provided by section 6(b) of the Act.

§ 780.407 System must be nonprofit or operated on a share-crop basis.

The exemption does not apply to employees employed in the described operations on facilities of any irrigation system unless the ditches, canals, reservoirs, or waterways in connection with which their work is done meet the statutory requirement that they either be not owned or operated for profit, or be operated on a share-crop basis. The employer is paid on a share-crop basis when he receives, as his total compensation, a share of the crop of the farmers serviced.

§ 780.408 Facilities of system must be used exclusively for agricultural purposes.

Section 13(b)(12) requires for exemption of irrigation work that the ditches, canals, reservoirs, or waterways in connection with which the employee's work is done be "used exclusively for supply and storing of water for agricultural purposes." If a water supplier supplies water for other than "agricultural purposes," the exemption would not apply. For example, the exemption would not apply where a portion of its water is delivered by the supplier to a municipality to be used for general, domestic, and commercial purposes. The fact that a small amount of the water furnished for use in his farming operations is in fact used for incidental domestic purposes by the farmer on the farm does not, however, require the conclusion that the water supplied was not exclusively "for agricultural purposes" within the meaning of the irrigation exemption in section 13(b)(12). Accordingly, if otherwise applicable, the exemption is not defeated merely because the water stored and supplied through the ditches, canals, reservoirs, or waterways of the irrigation system includes a small amount which is used for domestic purposes on the farms to which it is supplied. On the other hand, if the water supplier should maintain separate facilities for storing and supplying water for domestic use, it is clear that employees employed in connection with the maintenance or operation of such facilities would not be employed in activities to which the exemption applies. Water used for watering livestock raised by a farmer is "for agricultural purposes."

§ 780.409 Employment "in connection with the operation or maintenance" is exempt.

The irrigation exemption provided by section 13(b)(12) applies to "any employee employed * * * in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways" of an irrigation system which qualifies for the exemption. The employee, to be exempt, must be employed "in connection with the operation or maintenance" of the named facilities; other employees of the irrigation system, not employed in connection with the named activities, are not exempt. The exemption may apply to employees engaged in insect, rodent, and weed control along the canals and waterways of the irrigation system.

Subpart F—Employment or Agricultural Employees in Processing Shade-Grown Tobacco; Exemption From Minimum Wage and Overtime Pay Requirements Under Section 13(a)(14)

INTRODUCTORY

§ 780.500 Scope and significance of interpretative bulletin.

Subpart A of this Part 780 and this Subpart F together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(a)(14) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the minimum wage and overtime pay provisions of the Act for certain agricultural employees engaged in the processing, prior to stemming, or shade-grown tobacco for use as cigar wrapper tobacco. As appears more fully in Subpart A, interpretations in this bulletin with respect to provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The exemptions provided in section 13(a)(6) of the Act for employees employed in agriculture is not discussed in this subpart except in its relation to section 13(a)(14). The meaning and application of the section 13(a)(6) exemption is fully considered in Subpart D of this Part 780.

§ 780.501 Statutory provision.

Section 13(a)(14) of the Fair Labor Standards Act exempts from the minimum wage requirements of section 6 of the Act and from the overtime provisions of section 7:

> Any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.

§ 780.502 Legislative history of exemption.

The exemption for shade-grown tobacco workers was added to the Act by the Fair Labor Standards Amendments of 1961. The intent of the committee which inserted the provision in the amendments which were reported to the House (see H. Rept. No. 75, 87th Cong., first sess., p. 29) was to exclude from the minimum wage and overtime requirements of the Act "employees engaged prior to the stemming process in processing shade-grown tobacco for use as cigar wrapper tobacco, but only if the employees were employed in the growing and harvesting of such tobacco". The Report also pointed out that "such operations were assumed to be exempt prior to the case of Mitchell v. Budd, 350 U.S. 473 (1956), as a continuation of the agricultural process occurring in the vicinity where the tobacco was grown". The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. In that form, it would have altered the effect of the Supreme Court's decision in the case of Mitchell v. Budd, cited above, by bringing the described employees under the exemption provided for agriculture in section 13(a)(6) of the Act. (H. Rept. No. 75, p. 26, and H. Rept. No. 327, p. 17, 87th Cong., first sess.) The Conference Committee, in changing the provision to provide a separate exemption, made it clear that it was "not intended by the committee of conference to change * * * by the exemption for employees engaged in the named operations on shade-grown tobacco the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts." (H. Rept. No. 327, supra, p. 18.)

§ 780.503 What determines the application of the exemption.

The application of the section 13(a)(14) exemption depends upon the nature of the work performed by the individual employee for whom exemption is sought and not upon the character of the work of the employer. A determination of whether an employee is exempt therefore requires an examination of that employee's duties. Some employees of the employer may therefore be exempt while others may not.

REQUIREMENTS FOR EXEMPTION

§ 780.504 Basic conditions of exemption.

Under section 13(a)(14) of the Act all the following conditions must be met in order for the exemption to apply to an employee:

(a) He must work on "shade-grown tobacco."

(b) He must be an "agricultural employee" employed "in the growing and harvesting" of shade-grown tobacco.

(c) He must be engaged "in the processing * * * of such tobacco" and this processing must be both "prior to the stemming process" and to prepare the tobacco "for use as cigar wrapper tobacco." These requirements are discussed in the following sections of this subpart.

SHADE-GROWN TOBACCO

§ 780.505 Definition of "shade-grown tobacco."

Shade-grown tobacco to which the exemption applies is Connecticut Valley Shade-Grown U.S. Type 61 and Georgia-Florida Shade-Grown U.S. Type 62.

§ 780.506 Dependence of exemption on shade-grown tobacco operations.

The exemption provided by section 13(a)(14) of the Act is limited to the performance of certain operations with respect to the specified commodity, shade-grown tobacco. Work in connection with any other kind of tobacco, or any other commodity, including any other farm product, is not exempt under this section. An employee must be an agricultural employee variously employed in the growing and harvesting of "shade-grown tobacco" and in the described processing of "such tobacco" in order that the section 13(a)(14) exemption may apply.

§ 780.507 "Such tobacco."

To be within the exemption, the processing activities with respect to shade-grown tobacco must be performed by an employee who has been employed in growing and harvesting "such tobacco." The term "such tobacco" clearly is limited to the specified type of tobacco named in the section, that is, shade-grown tobacco. While a literal interpretation of the term "such tobacco" might lead to a conclusion that the exemption extends only to the processing of the tobacco which the employee grew or harvested, it appears from the legislative history that the intent was to extend the exemption to the processing of such tobacco which may be viewed "as a continuation of the agricultural process, occurring in the vicinity where the tobacco was grown." (H. Rept. 75, 87th Cong., first sess., p. 26.) Thus, it appears that the term "such tobacco" has reference to the local crop of shade-grown tobacco, raised by other local growers as well as by the processor, and which is being processed as a continuation of the growing and harvesting of such crop in the vicinity.

§ 780.508 Application of the exemption.

(a) As indicated in § 780.504, an employee qualifies for exemption under section 13(a)(14) only if he is an agricultural employee employed in the growing and harvesting of shade-grown tobacco and is engaged in the processing of such tobacco. However, both operations do not have to be performed during the same workweek. Section 13(a)(14) of the Act is intended to exempt any agricultural employee from the minimum wage and overtime provisions of the Act in any workweek when he is employed in the growing and harvesting of shade-grown tobacco, irrespective of the provisions of section 13(a)(6) and whether or not in such workweek he is also engaged in the processing of the tobacco as described in section 13(a)(14). The exemption would also apply in any workweek in which the employee, who grew and harvested shade-grown tobacco, is exclusively engaged in such processing.

(b) An employee so employed in any workweek is considered to be excluded from the "employee employed in agriculture" whose exemption from the pay provisions of the Act is governed by section 13(a)(6). Therefore, his man-days of exempt labor under section 13(a)(14) in any such workweek are not to be counted as man-days of agricultural labor within the meaning of section 3(u) of the Act and to which section 13(a)(6) refers.

(c) However, since section 3(u) defines man-day to mean "any day during which an employee performs any agricultural labor for not less than 1 hour" in the case of an employee who qualifies for the exemption in some workweeks but not in others under section 13(a)(14), all such man-days of his agricultural labor in the workweeks when he is not exempt under section 13(a)(14) will be counted. In this connection, the performance of some agricultural work which does not relate to shade-grown tobacco by an agricultural employee of a grower of such tobacco will not be considered as the performance of nonexempt work outside the section 13(a)(14) exemption in any workweek in which such an employee is employed by such an employer in the growing and harvesting of such tobacco or in its processing prior to stemming, or both, and engages in other agricultural work only incidentally or to an insubstantial extent.

§ 780.509 Agriculture.

The definition of "agriculture," as contained in section 3(f) of the Act, is discussed in Subpart B of this Part 780. The principles there discussed should be referred to as guides to the meaning of the terms "agricultural employee" and "growing and harvesting" as used in section 13(a)(14).

§ 780.510 "Any agricultural employee."

The section 13(a)(14) exemption applies to "any agricultural employee" who is employed in the specified activities. The term "any agricultural employee" includes not only agricultural employees of the tobacco grower but also such employees of other farmers or independent contractors. "Any agricultural employee" employed in the growing and harvesting of shade-grown tobacco will qualify for exemption if he engages in the specified processing operations. The use of the word "agricultural" before "employee" makes it apparent that separate consideration must be given to whether an employee is an "agricultural employee" and to whether he is employed in the specified "growing and harvesting" within the meaning of the Act.

§ 780.511 Meaning of "agricultural employee."

An "agricultural employee," for purposes of section 13(a)(14), may be defined as an employee employed in activities which are included in the definition of "agriculture" in section 3(f) of the Act (see § 780.103), and who is employed in these activities with sufficient regularity or continuity to characterize him as a person who engages in them as an occupation. Isolated or sporadic instances of engagement by an employee in activities defined as "agriculture" would not ordinarily establish that he is an "agricultural employee." His engagement in agriculture should be sufficiently substantial to demonstrate some dedication to agricultural work as a means of livelihood.

§ 780.512 "Employed in the growing and harvesting."

Section 13(a)(14) exempts processing operations on shade-grown tobacco only when performed by agricultural employees "employed in the growing and harvesting" of such tobacco. The use of the term "and" in the phrase "growing and harvesting" may be in recognition of the fact that in the raising of shade-grown tobacco the two operations are typically intermingled; however, it is not considered that the word "and" would preclude a determination on the particular facts that an employee is qualified for the exemption if he is employed only in "growing" or only in "harvesting." Employment in work other than growing and harvesting of shade-grown tobacco will not satisfy the requirement that the employee be employed in growing and harvesting, even if such work is on shade-grown tobacco and constitutes "agriculture" as defined in section 3(f) of the Act. For example, delivery of the tobacco by an employee of the farmer to the receiving platform of the bulking plant would be a "delivery to market" included in "agriculture" when performed by the farmer as an incident to or in conjunction with his farming operations (Mitchell v. Budd, 350 U.S. 473), but it would not be part of "growing and harvesting."

§ 780.513 What employment in growing and harvesting is sufficient.

To qualify for exemption the employee must be one of those who "were employed in the growing and harvesting of such tobacco" (H. Rept. No. 75, 87th Cong., First Sess., p. 29) and one whose processing work could be viewed as a "continuation of the agricultural process, occurring in the vicinity where the tobacco was grown." (Ibid. p. 26.) This appears to require that such employment be in connection with the crop of shade-grown tobacco which is being processed; it appears to preclude an employee who has had no such employment in the current crop season from qualifying for this exemption even if in some past season he was employed in growing and harvesting such tobacco. Bona fide employment in growing and harvesting shade-grown tobacco would also appear to be necessary. An attempt to qualify an employee for the processing exemption by sending him to the fields for growing or harvesting work for a few hours or days would not establish the bona fide employment in growing and harvesting contemplated by the Act. It would not seem sufficient that an employee has been engaged in growing or harvesting operations only occasionally or casually or incidentally for a small fraction of his work time. (See Walling v. Haden, 153 F. 2d 196.) Employment for a significant period in the current crop season or on some regular recurring basis during this season would appear to be necessary before an agricultural employee could reasonably be described as one "employed in the growing and harvesting of shade-grown tobacco." The determination in a doubtful case will, therefore, require a careful examination and consideration of the particular facts.

§ 780.514 "Growing" and "harvesting."

The general meaning of "growing" and "harvesting" of agricultural commodities is explained in §§ 780.117 and 780.118 of Subpart B of this Part 780, where the meaning of these terms as used in the Act's definition of agriculture is fully discussed. As there indicated, these terms include the actual raising of the crop and the operations customarily performed in connection with the removal of the crops by the farmer from their growing position, but do not extend to operations subsequent to and unconnected with the actual process whereby the agricultural commodities are severed from their attachment to the soil. Thus, while transportation to a concentration point on the farm may be included, "harvesting" never extends to transportation or other operations off the farm. The "growing" of shade-grown tobacco is considered to include such work as preparing the soil, planting, irrigating, fertilizing, and other activities. This type of tobacco requires special cultivation and is grown in fields that are completely enclosed and covered with cheesecloth shade. The leaves of the plant are picked in stages, as they mature. The leaves are taken immediately to a tobacco barn, located on the farm, where they are strung on sticks and dried by heat. Before the drying process is completed, the leaves are allowed to absorb moisture. Then they are dried again. It is not until the end of this drying operation that the leaves are packed in boxes and taken from the farm to a building plant for further processing (see Mitchell v. Budd, 350 U.S. 473). Under the general principles stated above, "harvesting" of shade-grown tobacco is considered to include the removal of the tobacco leaves from the plant and moving the tobacco from the field to the drying barn on the farm, together with the performance of other work as a necessary part of such operations. Subsequent operations such as the drying of the tobacco in the barn on the farm and packing of the tobacco for transportation to the bulking plant are not included in "harvesting."

EXEMPT PROCESSING

§ 780.515 Processing requirements of section 13(a)(14).

When it has been determined that an employee is an "agricultural employee employed in the growing and harvesting of shade-grown tobacco," to whom section 13(a)(14) of the Act may apply, it then becomes necessary to ascertain whether he is "engaged in the processing * * * of such tobacco, prior to the stemming process, for use as Cigar-wrapper tobacco."

§ 780.516 "Prior to the stemming process."

The exemption provided by section 13(a)(14) applies only to employees whose processing operations on shade-grown tobacco are performed "prior to the stemming process." (See H. Rept. No. 75, 87th Cong., first sess., p. 26). This means that an employee engaged in stemming, the removal of the midrib from the tobacco leaf (McComb v. Puerto Rico Tobacco Marketing Co-op. Ass'n., 80 F. Supp. 953, affirmed 181 F. 2d 697), or in any operations on the tobacco which are performed after stemming has begun will not come within the exemption. Stemming and all subsequent operations are nonexempt work.

§ 780.517 "For use as Cigar-wrapper tobacco."

The phrase "for use as Cigar-wrapper tobacco" limits the type of end product which may be produced by the exempt operations. As its name indicates, cigar-wrapper tobacco is used as a cigar wrapper and is distinguished from other types of tobacco which serve other purposes such as filler, pipe, chewing, and other kinds of tobacco. Normally, shade-grown tobacco is used only for cigar wrappers. However, if the tobacco is not being processed by the employer for such specific and limited use, the employee is not engaged in exempt processing operations.

§ 780.518 Exempt processing operations.

The processing operations under section 13(a)(14) include, but are not limited to, "drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling" of the shade-grown tobacco. As previously noted, these operations are exempt only if performed on shade-grown tobacco prior to the stemming process to prepare the tobacco for use as cigar wrapper tobacco.

§ 780.519 General scope of exempt operations.

All operations normally performed in the processing of shade-grown tobacco for use as cigar wrapper tobacco, if performed prior to the stemming process and for such use, are included in the exemption. As a whole, this processing substantially changes the physical properties and chemical content of the tobacco, improves its color, increases its combustibility, and eliminates the rawness and harshness of the freshly cured leaf. In the process the leaves are piled in "bulks" of about 4,000 pounds each to undergo a "sweating" or "fermentation" process in which temperature and humidity are carefully controlled. Proper heat control includes, among other things, breaking up the bulk, redistributing the tobacco, and adding water. Proper fermentation or aging requires the bulk to be reconstructed several times. This bulking process may last from 4 to 8 months. When the tobacco is properly dried, cured, fermented, and aged, it is moved to long tables where the leaves are individually graded and sorted, after which they are tied in bundles called "hands" of about 30 to 35 leaves each, which are then baled for shipment. Equipment required for the work may include a steam-heated plant, platforms, thermometers, bulk covers, baling boxes and presses, baling mats and packing, sorting, and grading tables. (See Mitchell v. Budd, 350 U.S. 473, 475.) Employees performing any part of this processing prior to the stemming process, including the operations named in section 13(a)(14), may come within the exemption if they are otherwise qualified and if the tobacco on which they work is being processed for use as cigar wrapper tobacco.

§ 780.520 Particular operations which may be exempt.

(a) *General.* Section 13(a)(14) lists a number of operations as being included in the processing of shade-grown tobacco. Some of these are, and others are not, themselves "processing" in the sense that performance of the operations changes the natural form of the commodity on which it is performed. All of the operations named and described in paragraph (b) of this section, however, are a necessary and integral part of the overall process of preparing shade-grown tobacco for use as cigar wrapper tobacco and, when performed as part of that process and prior to stemming of the tobacco, by an employee qualified under the terms of the section, will provide the basis for his exemption from the minimum wage and overtime provisions of the Act.

(b) *Particular operations*—(1) *Drying.* Drying includes the removal or lowering of the moisture content of the tobacco, whether by natural means or by exposure to heat from ovens, furnaces, etc.

(2) *Curing.* Curing includes removing the tobacco to the curing shed or barn and stringing the tobacco over slats.

(3) *Fermenting.* Fermenting includes the operations controlling the chemical changes which take place in the tobacco as the result of bulking and rebulking.

(4) *Bulking.* Bulking includes piling the tobacco in piles or bulks of about 4,000 pounds each for the purpose of fermenting the tobacco.

(5) *Rebulking.* Rebulking includes the breaking down of the tobacco bulks or piles and rearranging them so that the tobacco on the inside will be placed on the outside of the bulk and tobacco on the outside will be placed inside.

(6) *Sorting.* Sorting includes segregation of the tobacco leaves in connection with the grading and classifying of the cured tobacco.

(7) *Grading.* Grading includes sorting or classifying as to size and quality.

(8) *Aging.* Aging includes the curing process brought about by bulking.

(9) *Baling.* Baling includes the tying of the tobacco into "hands" and placing them in bales for shipment.

§ 780.521 Other processing operations.

The language of the section, namely, "including, but not limited to," extends the exemption for processing to include other operations in the processing of shade-grown tobacco besides those specifically enumerated. These additional operations include only those which are a necessary and integral part of preparing the shade-grown tobacco for use as cigar wrapper tobacco. These additional operations, like those enumerated in section 13(a)(14), must be performed before the tobacco has been stemmed. Stemming work and further work on the tobacco after stemming has been performed are nonexempt.

§ 780.522 Nonprocessing employees.

Only those employees who actually engaged in the growing and harvesting of shade-grown tobacco and the specified exempt processing activities are exempt. Clerical, maintenance and custodial workers are not included.

Subpart G—Employment in Agriculture and Livestock Auction Operations Under the Section 13(b)(13) Exemption

INTRODUCTORY

§ 780.600 Scope and significance of interpretative bulletin.

Subpart A of this Part 780 and this Subpart G together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(13) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for certain employees who, in the same workweek, are employed by a farmer in agriculture and also in the farmer's livestock auction operations. As appears more fully in Subpart A of this part, interpretations in this bulletin with respect to provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The general exemptions provided in sections 13(a)(6) and 13(b)(12) of the Act for employees employed in agriculture are not discussed in this subpart except in its relation to section 13(b)(13). The meaning and application of these exemptions are fully considered in Subparts D and E of this Part 780.

§ 780.601 Statutory provision.

Section 13(b)(13) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

> Any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1).

§ 780.602 General explanatory statement.

Ordinarily, as discussed in Subparts D and E of this Part 780, an employee who in the same workweek engages in work which is exempt as agriculture under section 13(a)(6) or 13(b)(12) of the Act and also performs nonexempt work to which the Act applies is not exempt in that week (§ 780.11). Employees of a farmer are not employed in work exempt as "agriculture" while engaged in livestock auction operations in which the livestock offered at auction includes livestock raised by other farmers (Mitchell v. Hunt, 263 F. 2d 913) (C.A. 5); Hearnsberger v. Gillespie, 435 F. 2d 926 (C.A. 8). However, under section 13(b)(13) an employee who is employed by a farmer in agriculture as well as in livestock auction operations in the same workweek will not lose the overtime exemption for that workweek, if certain conditions are met. These conditions and their meaning and application are discussed in this subpart.

REQUIREMENTS FOR EXEMPTION

§ 780.603 What determines application of exemption.

The application of the section 13(b)(13) exemption depends largely upon the nature of the work performed by the individual employee for whom exemption is sought. The character of the employer's business also determine the application of the exemption. Whether an employee is exempt therefore depends upon his duties as well as the nature of the employer's activities. Some employees of the employer may be exempt in some weeks and others may not.

§ 780.604 General requirements.

The general requirements for exemption under section 13(b)(13) are as follows:

(a) Employment of the employee "primarily" in agriculture in the particular workweek.

(b) This primary employment by a farmer.

(c) Engagement by the farmer in raising livestock.

(d) Engagement by the farmer in livestock auction operations "as an adjunct to" the raising of livestock.

(e) Payment of the minimum wage required by section 6(a)(1) of the Act for all hours spent in livestock auction work by the employee.

These requirements will be separately discussed in the following sections of this subpart.

§ 780.605 Employment in agriculture.

One requirement for exemption is that the employee be employed in "agriculture." "Agriculture," as used in the Act, is defined in section 3(f) as follows:

> (f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

An employee meets the tests of being employed in agriculture when he either engages in any one or more of the branches of farming listed in the first part of the above definition or performs, as an employee of a farmer or on a farm, practices incident to such farming operations as mentioned in the second part of the definition (Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755). The exemption applies to "any employee" of a farmer whose employment meets the tests for exemption. Accordingly, any employee of the farmer who is employed in "agriculture," including laborers, clerical, maintenance, and custodial employees, harvesters, dairy workers, and others may qualify for the exemption under section 13(b)(13) if the other conditions of the exemption are met.

§ 780.606 Interpretation of term "agriculture."

Section 3(f) of the Act, which defines "agriculture," has been extensively interpreted by the Department of Labor and the courts. Subpart B of this Part 780 contains those interpretations which have full application in construing the term "agriculture" as used in the 13(b)(13) exemption.

§ 780.607 "Primarily employed" in agriculture.

Not only must the employee be employed in agriculture, but he must be "primarily" so employed during the particular workweek or weeks in which the 13(b)(13) exemption is to be applied. The word "primarily" may be considered to mean chiefly or principally (Agnew v. Board of Governors, 153 F. 2d 785). This interpretation is consistent with the view, expressed by the sponsor of the exemption at the time of its adoption on the floor of the Senate (107 Cong. Rec. (daily ed., April 19, 1961), p. 5879), that the word means "most of his time." The Department of Labor will consider that an employee who spends more than one-half of his hours worked in the particular workweek in agriculture, as defined in the Act, is "primarily" employed in agriculture during that week.

§ 780.608 "During his workweek."

Section 13(b)(13) specifically requires that the unit of time to be used in determining whether an employee is primarily employed in agriculture is "during his workweek." The employee's own workweek, and not that of any other person, is to be used in applying the exemption. The employee's employment must meet the "primarily" test in each workweek in which the exemption is applied to him.

§ 780.609 Workweek unit in applying the exemption.

The unit of time to be used in determining the application of the exemption to an employee is the workweek. (See Overnight Transportation Co. v. Missel, 316 U.S. 572.) A workweek is a fixed and regularly recurring interval of seven consecutive 24-hour periods.

It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing of the workweek for the purpose of escaping the requirements of the Act is not permitted.

§ 780.610 Workweek exclusively in exempt work.

An employee who engages exclusively in a workweek in duties which come within the exemption under section 13(b)(13) and is paid in accordance with the requirements of that exemption, is exempt in that workweek from the overtime requirements of the Act.

§ 780.611 Workweek exclusively in agriculture.

In any workweek in which the employee works exclusively in agriculture, performing no duty in respect to livestock auction operations, his exemption for that week is determined by application of sections 13(a)(6) and 13(b)(12) to his activities. (See Subparts D and E of this part.)

§ 780.612 Employment by a "farmer."

A further requirement for exemption is the expressed statutory one that the employee must be employed in agriculture by a "farmer." Employment by a nonfarmer will not qualify an employee for the exemption.

§ 780.613 "By such farmer."

The employee's primary employment in agriculture during the exempt week is also required to be by "such farmer." The phrase "such farmer" refers to the particular farmer by whom the employee is employed in agriculture and who engages in the livestock auction operations as an adjunct to his raising of livestock. Even if an employee may spend more than half of his work time in a workweek in agriculture, he would not be exempt if such employment in agriculture were engaged in for various persons so that less than the primary portion of his workweek was performed in his employment in agriculture by such farmer. For example, an employee may work a 60-hour week and be employed in agriculture for 50 of those hours, of which 20 hours are worked in his employment by the farmer who is engaged in the livestock auction operations, the other 30 being performed for a neighboring farmer. Although this employee was primarily employed in agriculture during the workweek he is not exempt. His primary employment in agriculture was not by the farmer described in section 13(b)(13) as required.

§ 780.614 Definition of a farmer.

The Act does not define the term "farmer." Whether an employer is a "farmer" within the meaning of section 13(b)(13) must be determined by consideration of the particular facts, keeping in mind the purpose of the exemption. A full discussion of the meaning of the term "farmer" as used in the Act's definition of agriculture is contained in §§ 780.130 through 780.133. Generally, as indicated in that discussion, a farmer under the Act is one who engages, as an occupation, in farming operations as a distinct activity for the purpose of producing a farm crop. A corporation or a farmers' cooperative may be a "farmer" if engaged in actual farming of the nature and extent there indicated.

§ 780.615 Raising of livestock.

Livestock auction operations are within the 13(b)(13) exemption only when they are conducted as an adjunct to the raising of livestock by the farmer. The farmer is required to engage in the raising of livestock as a prerequisite for the exemption of an employee employed in the operations described in section 13(b) (13). Engagement by the farmer in one or more of the other branches of farming will not meet this requirement.

§ 780.616 Operations included in raising livestock.

Raising livestock includes such operations as the breeding, fattening, feeding, and care of domestic animals ordinarily raised or used on farms. A fuller discussion of the meaning of raising livestock is contained in §§ 780.119 through 780.122.

§ 780.617 Adjunct livestock auction operations.

The livestock auction operations referred to in section 13(b)(13) are those engaged in by the farmer "as an adjunct" to the raising of livestock. This phrase limits the relative extent to which the farmer may conduct livestock auctions and claim exemption under section 13(b)(13). To qualify under the exemption provision, the auction operations should be an established part of the farmer's raising of the livestock and subordinate to it. (Hearnsberger v. Gillespie, 435 F. 2d 926 (C.A. 8).) The auction operations should not be conducted on so large a scale as to predominate over the raising of livestock. The livestock auction should be adjunct to the farmer's raising of livestock not only when he engages in it on his own account, but also when he joins with other farmers to hold an auction.

§ 780.618 "His own account"—"in conjunction with other farmers."

Under the terms of section 13(b)(13), the farmer may operate a livestock auction solely for his own benefit or he may join with "other farmers" to auction livestock for their mutual benefit. (See § 780.614 with regard to the definition of "farmer.") Unless the auction is conducted by the farmer alone or with others who are "farmers" the exemption does not apply.

§ 780.619 Work "in connection with" livestock auction operations.

An employee whose agricultural employment meets the tests for exemption may engage in "other" employment "in connection with" his employer's livestock auction operations under the conditions stated in section 13(b)(13). The work which an employee may engage in under the phrase "in connection with" includes only those activities which are a necessary incident to conducting a livestock auction of the limited type permitted under the exemption. Such work as transporting the livestock and caring for it, custodial, maintenance, and clerical duties are included. Work which cannot be considered necessarily incident to the livestock auction is not exempt.

§ 780.620 Minimum wage for livestock auction work.

The application of the exemption is further determined by whether another condition has been met. That condition is that the employee, in the workweek in which he engages in livestock auction activities, must be paid at a wage rate not less than the minimum rate required by section 6(a)(1) of the Act for the time spent in livestock auction work. The exemption does not apply unless there is payment for all hours spent in livestock auction work at not less than the applicable minimum rate prescribed in the Act.

EFFECT OF EXEMPTION

§ 780.621 No overtime wages in exempt week.

In a workweek in which all the requirements of the section 13(b)(13) exemption are met, the employee is exempt from the overtime requirements of section 7 for that entire workweek.

Subpart H—Employment by Small Country Elevators Within Area of Production; Exemption From Overtime Pay Requirements Under Section 13(b)(14)

INTRODUCTORY

§ 780.700 Scope and significance of interpretative bulletin.

Subpart A of this Part 780 and this subpart together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(14) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for employees employed by certain country elevators "within the area of production," as defined by the Secretary of Labor in Part 536 of this chapter.

§ 780.701 Statutory provision.

Section 13(b)(14) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

Any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm: *Provided*, That no more than five employees are employed in the establishment in such operations * * *.

§ 780.702 What determines application of the exemption.

The application of the section 13(b)(14) exemption depends on te employment of the employee by an establishment of the kind described in the section, and on such employment "within the area of production" as defined by regulation. In any workweek when an employee is employed in country elevator activities by such an establishment within the area of production, the overtime pay requirements of the Act will not apply to him.

§ 780.703 Basic requirements for exemption.

The basic requirements for exemption of country elevator employees under section 13(b)(14) of the Act are as follows:

(a) The employing establishment must—

(1) Be an establishment "commonly recognized as a country elevator," and

(2) Have not more than five employees employed in its operations as such; and

(b) The employee must—

(1) Be "employed by" such establishment, and

(2) Be employed "within the area of production," as defined by the Secretary of Labor.

All the requirements must be met in order for the exemption to apply to an employee in any workweek. The requirements in section 13(b)(14) are "explicit prerequisites to exemption" and the burden of showing that they are satisfied rests upon the employer who asserts that the exemption applies (Arnold v. Kanowsky, 361 U.S. 388). In accordance with the general rules stated in § 780.2 of Subpart A of this Part 780, this exemption is to be narrowly construed and applied only to those establishments plainly and unmistakably within its terms and spirit. The requirements for its application will be separately discussed below.

ESTABLISHMENT COMMONLY RECOGNIZED AS A COUNTRY ELEVATOR

§ 780.704 Dependence of exemption on nature of employing establishment.

If an employee is to be exempt under section 13(b)(14), he must be employed by an "establishment" which is "commonly recognized as a country elevator." If he is employed by such an establishment, the fact that it may be part of a larger enterprise which also engages in activities that are not recognized as those of country elevators (see Tobin v. Flour Mills, 185 F. 2d 596) would not make the exemption inapplicable.

§ 780.705 Meaning of "establishment."

The word "establishment" has long been interpreted by the Department of Labor and the courts to mean a distinct physical place of business and not to include all the places of business which may be operated by an organization (Phillips v. Walling, 334 U.S. 490; Mitchell v. Bekins Van and Storage Co., 352 U.S. 1027). Thus, in the case of a business organization which operates a number of country elevators (see Tobin v. Flour Mills, 185 F. 2d 596), each individual elevator or other place of business would constitute an establishment, within the meaning of the Act. Country elevators are usually one-unit places of business with, in some cases, an adjoining flat warehouse. No problem exists of determining what is the establishment in such cases. However, where separate facilities are used by a country elevator, a determination must be made, based on their proximity to the elevator and their relationship to its operations, on whether the facilities and the elevator are one or more than one establishment. If there are more than one, it must be determined by which establishment the employee is employed and whether that establishment meets the requirements of section 13(b)(14) before the application of the exemption to the employee can be ascertained (compare Mitchell v. Cammill, 245 F. 2d 207; Remington v. Shaw (W.D. Mich.), 2 WH Cases 262).

§ 780.706 Recognition of character of establishment.

A further requirement for exemption is that the establishment must be "commonly recognized" as a country elevator. The word "commonly" means ordinarily or generally and the term "recognized" means known. An elevator should be generally known by the public as a country elevator. This requirement imposes, on the establishment for whose employees exemption is sought, the obligation to demonstrate that it engages in the type of work and has the attributes which will cause the general public to know it as a country elevator. The recognition which the statute requires must be shown to exist if the employer seeks to take the benefit of the exemption (see Arnold v. Kanowsky, 361 U.S. 388, 395).

§ 780.707 Establishments "commonly recognized" as country elevators.

In determining whether a particular establishment is one that is "commonly recognized" as a country elevator—and this must be true of the particular establishment if the exemption is to apply—it should be kept in mind that the intent of section 13(b)(14) is to "exempt country elevators that market farm products, mostly grain, for farmers" (107 Cong. Rec. (daily ed.) p. 5883). It is also appropriate to consider the characteristics and functions which the courts and government agencies have recognized as those of "country elevators" and the distinctions which have been recognized between country elevators and other types of establishments. For example, in proceedings to determine industries of a seasonal nature under Part 526 of the regulations in this chapter, "country" grain elevators, public terminal and subterminal grain elevators, wheat flour mill elevators, non-elevator-type bulk grain storing establishments, and "flat warehouses" in which grain is stored in sacks, have been recognized as distinct types of establishments engaged in grain storage. (See 24 FR 2584; 3581.) As the legislative history of the exemption cited above makes clear, country elevators handle "mostly grain." The courts have recognized that the terms "country elevator" and "country grain elevator" are interchangeable (the term "country house" has also been recognized as synonymous), and that there are significant differences between country elevators and other types of establishments engaged in grain storage (see Tobin v. Flour Mills, 185 F. 2d 596; Mitchell v. Sampson Const. Co. (D. Kan.) 14 WH Cases 269).

§ 780.708 A country elevator is located near and serves farmers.

Country elevators, as commonly recognized, are typically located along railroads in small towns or rural areas near grain farmers, and have facilities especially designed for receiving bulk grain by wagon or truck from farms, elevating it to storage bins, and direct loading of the grain in its natural state into railroad boxcars. The principal function of such elevators is to provide a point of initial concentration for grain grown in their local area and to handle, store for limited periods, and load out such grain for movement in carload lots by rail from the producing area to its ultimate destination. They also perform a transport function in facilitating the even and orderly movement of grain over the interstate network of railroads from the producing areas to terminal elevators, markets, mills, processors, consumers, and to seaboard ports for export. The country elevator is typically the farmer's market for his grain or the point at which his grain is delivered to carriers for transportation to market. The elevator may purchase the grain from the farmer or store and handle it for him, and it may also store and handle substantial quantities of grain owned by or pledged to the Government under a price-support program. Country elevators customarily receive, weigh, test, grade, clean, mix, dry, fumigate, store, and load out grain in its natural state, and provide certain incidental services and supplies to farmers in the locality. The foregoing attributes of country elevators have been recognized by the courts. See, for example, Mitchell v. Sampson Const. Co. (D. Kan.) 14 WH Cases 269; Tobin v. Flour Mills, 185 F. 2d 596; Holt v. Barnesville Elevator Co., 145 F. 2d 250;

Remington v. Shaw (W.D. Mich.), 2 WH Cases 262.

§ 780.709 Size and equipment of a country elevator.

Typically, the establishments commonly recognized as country elevators are small. Most of the establishments intended to come within the exemption have only one or two employees (107 Cong. Rec. (daily ed.) p. 5883), although some country elevators have a larger number. (See Holt v. Barnesville Elevator Co., 145 F. 2d 250.) Establishments with more than five employees are not within the exemption. (See § 780.712.) The storage capacity of a country elevator may be as small as 6,000 bushels (see Tobin v. Flour Mills, 185 F. 2d 596) and will generally range from 15,000 to 50,000 bushels. As indicated in § 780.708, country elevators are equipped to receive grain in wagons or trucks from farmers and to load it in railroad boxcars. The facilities typically include scales for weighing the farm vehicles loaded with grain, grain bins, cleaning and mixing machinery, driers for prestorage drying of grain and endless conveyor belts or chain scoops to carry grain from the ground to the top of the elevator. The facilities for receiving grain in truckloads or wagonloads from farmers and the limited storage capacity, together with location of the elevator in or near the grain-producing area, serve to distinguish country elevators from terminal or subterminal elevators, to which the exemption is not applicable. The latter are located at terminal or interior market points, receive grain in carload lots, and receive the bulk of their grain from country elevators. Although some may receive grain from farms in the immediate areas, they are not typically equipped to receive grain except by rail. (See Tobin v. Flour Mills, supra; Mitchell v. Sampson Const. Co. (D. Kan.) 14 WH Cases 269.) It is the facilities of a country elevator for the elevation of bulk grain and the discharge of such grain into rail cars that make it an "elevator" and distinguish it from warehouses that perform similar functions in the flat warehousing, storage, and marketing for farmers of grain in sacks. Such warehouses are not "elevators" and therefore do not come within the section 13(b)(14) exemption.

§ 780.710 A country elevator may sell products and services to farmers.

Section 13(b)(14) expressly provides that an establishment commonly recognized as a country elevator, within the meaning of the exemption, includes "such an establishment which sells products and services used in the operation of a farm." This language makes it plain that if the establishment is "such an establishment," that is, if its functions and attributes are such that it is "commonly recognized as a country elevator" but not otherwise, exemption of its employees under this section will not be lost solely by reason of the fact that it sells products and services used in the operation of a farm. Establishments commonly recognized as country elevators, especially the smaller ones, not only engage in the storing of grain but also conduct various merchandising or "sideline" operations as well. They may distribute feed grains to feeders and other farmers, sell fuels for farm use, sell and treat seeds, and sell other farm supplies such as fertilizers, farm chemicals, mixed concentrates, twine, lumber, and farm hardware supplies and machinery. (See Tobin v. Flour Mills, 185 F. 2d 596; Holt v. Barnesville Elevator Co., 145 F. 2d 250). Services performed for farmers by country elevators may include grinding of feeds, cleaning and fumigating seeds, supplying bottled gas, and gasoline station services. As conducted by establishments commonly recognized as country elevators, the selling of goods and services used in the operation of a farm is a minor and incidental secondary activity and not a main business of the elevator (see Tobin v. Flour Mills, supra; Holt v. Barnesville Elevator Co., supra).

§ 780.711 Exemption of mixed business applies only to country elevators.

The language of section 13(b)(14) permitting application of the exemption to country elevators selling products and services used in the operation of a farm does not extend the exemption to an establishment selling products and services to farmers merely because of the fact that it is also equipped to provide elevator services to its customers. The exemption will not apply if the extent of its business of making sales to farmers is such that the establishment is not commonly known as a "country elevator" or is commonly recognized as an establishment of a different kind. As the legislative history of the exemption indicates, its purpose is limited to exempting country elevators that market farm products, mostly grain, for farmers who are working long workweeks and need to have the elevator facilities open and available for disposal of their crops during the same hours that are worked by the farmers. (See 107 Cong. Rec. (daily ed.) p.5883.) The reason for the exemption does not justify its application to employees selling products and services to farmers otherwise than as an incidental and subordinate part of the business of a country elevator as commonly recognized. An establishment making such sales must be "such an establishment" to come within this exemption. An employer may, however, be engaged in the business of making sales of goods and services to farmers in an establishment separate from the one in which he provides the recognized country elevator services. In such event, the exemption of employees who work in both establishments may depend on whether the work in the sales establishment comes within another exemption provided by the Act. (See Remington v. Shaw (W.D. Mich.), 2 WH Cases 262, and infra, § 780.724.)

EMPLOYMENT OF "NO MORE THAN FIVE EMPLOYEES"

§ 780.712 Limitation of exemption to establishments with five or fewer employees.

If the operations of an establishment are such that it is commonly recognized as a country elevator, its employees may come within the section 13(b)(14) exemption provided that "no more than five employees are employed in the establishment in such operations". The exemption is intended, as explained by its sponsor, to "affect only institutions that have five employees or less" (107 Cong. Rec. (daily ed.) p. 5883). Since the Act is applied on a workweek basis, a country elevator is not an exempt place of work in any workweek in which more than five employees are employed in its operations.

§ 780.713 Determining the number of employees generally.

The number of employees referred to in section 13(b)(14) is the number "employed in the establishment in such operations". The determination of the number of employees so employed involves a consideration of the meaning of employment "in the establishment" and "in such operations" in relation to each other. If, in any workweek, an employee is "employed in the establishment in such operations" for more than a negligible period of time, he should be counted in determining whether, in that workweek, more than five employees were so employed. An employee so employed must be counted for this purpose regardless of whether he would, apart from this exemption, be within the coverage of the Act. Also, as noted in the following discussion, the employees to be counted are not necessarily limited to employees directly employed by the country elevator but may include employees directly employed by others who are engaged in performing operations of the elevator establishment.

§ 780.714 Employees employed "in such operations" to be counted.

(a) The five-employee limitation on the exemption for country elevators relates to the number of employees employed in the establishment "in such operations." This means that the employees to be counted include those employed in, and do not include any who are not employed in, the operations of the establishment commonly recognized as a country elevator, including the operations of such an establishment in selling products and services used in the operation of a farm, as previously explained.

(b) In some circumstances, an employee employed in an establishment commonly recognized as a country elevator may, during his workweek, be employed in work which is not part of the operations of the elevator establishment. This would be true, for example, in the case of an employee who spends his entire workweek in the construction of an overflow warehouse for the elevator. Such an employee would not be counted in that workweek because constructing a warehouse is not part of the operations of the country elevator but is an entirely distinct activity.

(c) Employees employed by the same employer in a separate establishment in which he is engaged in a different business, and not employed in the operations of the elevator establishment, would not be counted.

(d) Employees not employed by the elevator establishment who come there sporadically, occasionally, or casually in the course of their duties for other employers are not employed in the operations of the establishment commonly recognized as a country elevator and would not be counted in determining whether the five-employee limitation is exceeded in any workweek. Examples of such employees are employees of a restaurant who bring food and beverages to the elevator employees, and employees of other employers who make deliveries to the establishment.

§ 780.715 Counting employees "employed in the establishment."

(a) Employees employed "in the establishment," if employed "in such operations" as previously explained, are to be counted in determining whether the five-employee limitation on the exemption is exceeded.

(b) Employees employed "in" the establishment clearly include all employees engaged, other than casually or sporadically, in performing any duties of their employment there, regardless of whether they are direct employees of the country elevator establishment or are employees of a farmer, independent contractor, or other person who are suffered or permitted to work (see Act, section 3(g)) in the establishment. However, tradesmen, such as dealers and their salesmen, for example, are not employed in the elevator simply because they visit the establishment to do business there. Neither are workers who deliver, on behalf of their employers, goods used in the sideline business of the establishment to be considered employed in the elevator.

(c) The use of the language "employed in" rather than "engaged in" makes it plain also that the employees to be counted include all those employed by the establishment in its operations without regard to whether they are engaged in the establishment or away from it in performing their duties. This has been the consistent interpretation of similar language in other sections of the Act.

EMPLOYEES "EMPLOYED * * * BY" THE COUNTRY ELEVATOR ESTABLISHMENT

§ 780.716 Exemption of employees "employed * * * by" the establishment.

If the establishment is a country elevator establishment qualified for exemption as previously explained, and if the "area of production" requirement is met (see § 780.720), any employee "employed * * * by" such establishment will come within the section 13(b)(14) exemption. This will bring within the exemption employees who are engaged in duties performed away from the establishment as well as those whose duties are performed in the establishment itself, so long as such employees are "employed * * * by" the country elevator establishment within the meaning of the Act. The employees employed "by" the establishment, who may come within the exemption if the other requirements are met, are not necessarily identical with the employees employed "in the establishment in such operations" who must be counted for purposes of the five-employee limitation since some of the latter employees may be employed by another employer. (See §§ 780.712 through 780.715.)

§ 780.717 Determining whether there is employment "by" the establishment.

(a) No single test will determine whether a worker is in fact employed "by" a country elevator establishment. This question must be decided on the basis of the total situation (Rutherford Food Corp. v. McComb, 331 U.S.

722; U.S. v. Silk, 331 U.S. 704). Clearly, an employee is so employed where he is hired by the elevator, engages in its work, is paid by the elevator and is under its supervision and control.

(b) "Employed by" requires that there be an employer-employee relationship between the worker and the employer engaged in operating the elevator. The fact, however, that the employer carries an employee on the payroll of the country elevator establishment which qualifies for exemption does not automatically extend the exemption to that employee. In order to be exempt an employee must actually be "employed by" the exempt establishment. This means that whether the employee is performing his duties inside or outside the establishment, he must be employed in the work of the exempt establishment itself in activities within the scope of its exempt business in order to meet the requirement of actual employment "by" the establishment (see Walling v. Connecticut Co., 154 F. 2d 552).

(c) In the case of employers who operate multiunit enterprises and conduct business operations in more than one establishment (see Tobin v. Flour Mills, 185 F. 2d 596; Remington v. Shaw (W.D. Mich.) 2 WH Cases 262), there will be employees of the employer who perform central office or central warehousing activities for the enterprise or for more than one establishment, and there may be other employees who spend time in the various establishments of the enterprise performing duties for the enterprise rather than for the particular establishment in which they are working at the time. Such employees are employed by the enterprise and not by any particular establishment of the employer (Mitchell v. Miller Drugs, 255 F. 2d 574; Mitchell v. Kroger Co., 248 F. 2d 935). Accordingly, so long as they perform such functions for the enterprise they would not be exempt as employees employed by a country elevator establishment operated as part of such an enterprise, even while stationed in it or placed on its payroll.

§ 780.718 Employees who may be exempt.

Employees employed "by" a country elevator establishment which qualifies for exemption will be exempt, if the "area of production" requirement is met, while they are engaged in any of the customary operations of the establishment which is commonly recognized as a country elevator. Included among such employees are those who are engaged in selling the elevator's goods or services, keeping its books, receiving, handling, and loading out grain, grinding and mixing feed or treating seed for farmers, performing ordinary maintenance and repair of the premises and equipment or engaging in any other work of the establishment which is commonly recognized as part of its operations as a country elevator. An employee employed by such an elevator is not restricted to performing his work inside the establishment. He may also engage in his exempt duties away from the elevator. For example, a salesman who visits farmers on their farms to discuss the storage of their grain in the elevator is performing exempt work while on such visits. It is sufficient that an employee employed by an elevator is, while working away from the establishment, doing the exempt work of the elevator. If the establishment is engaged only in activities commonly recognized as those of a country elevator and none of its employees engaged in any other activities, all the employees employed by the country elevator will come within the exemption if no more than five employees are employed in the establishment in such operations and if the "area of production" requirement is met.

§ 780.719 Employees not employed "by" the elevator establishment.

Since the exemption depends on employment "by" an establishment qualified for exemption rather than simply the work of the employee, employees who are not employed by the country elevator are not exempt. This is so even though they work in the establishment and engage in duties which are part of the services which are commonly recognized as those of a country elevator. Since they are not employed by the elevator, employees of independent contractors, farmers and others who work in or for the elevator are not exempt under section 13(b)(14) simply because they work in or for the elevator (see Walling v. Friend, 156 F. 2d 429; Mitchell v. Kroger, 248 F. 2d 935; Durkin v. Joyce Agency, 110 F. Supp. 918, affirmed sub. nom. Mitchell v. Joyce Agency, 348 U.S. 945). Thus an employee of an independent contractor who works inside the elevator in drying grain for the elevator is not exempt under this section.

EMPLOYMENT "WITHIN THE AREA OF PRODUCTION"

§ 780.720 "Area of production" requirement of exemption.

(a) In addition to the requirements for exemption previously discussed, section 13(b)(14) requires that the employee employed by an establishment commonly recognized as a country elevator be "employed within the area of production (as defined by the Secretary)." Regulations defining employment within the "area of production" for purposes of section 13(b)(14) are contained in Part 536 of this chapter. All the requirements of the applicable regulations must be met in order for the exemption to apply.

(b) Under the regulations, an employee is considered to be employed within "the area of production" within the meaning of section 13(b)(14) if the country elevator establishment by which he is employed is located in the "open country or a rural community," as defined in the regulations, and receives 95 percent or more of the agricultural commodities handled through its elevator services from normal rural sources of supply within specified distances from the country elevator. A definition of "area of production" in terms of such criteria has been upheld by the U.S. Supreme Court in Mitchell v. Budd, 350 U.S. 473. Reference should be made to Part 536 of this chapter for the precise requirements of the definition.

(c) However, it is appropriate to point out here that nothing in the definition places limits on the distance from which commodities come to the elevator for purposes other than the storage of marketing of farm products. The commodities, 95 percent of which are required by definition to come from specified distances, are those agricular commodities received by the elevator with respect to which it performs the primary concentration, storage, and marketing functions of a country elevator as previously explained (see § 780.708). This is consistent with the emphasis given, in the legislative history, to the country elevator's function of marketing farm products, mostly grain, for farmers (see 107 Cong. Rec. (daily ed.) p. 5883). Commodities brought or shipped to a country elevator establishment not for storage or for market but in connection with its secondary, incidental, or side-line functions of selling products and services used in the operation of a farm (see § 780.610) are not required to be counted in determining whether 95 percent of the agricultural commodities handled come from rural sources of supply within the specified distances.

WORKWEEK APPLICATION OF EXEMPTION

§ 780.721 Employment in the particular workweek as test of exemption.

The period for determining whether the "area of production" requirement of section 13(b)(14) is met is prescribed in the regulations in Part 536 of this chapter. Whether or not an establishment is one commonly recognized as a country elevator must be tested by general functions and attributes over a representative period of time, as previously explained, and requires reexamination for exemption purposes only if these change. But insofar as the exemption depends for its application on the employment of employees, it applies on a workweek basis. An employee employed by the establishment is not exempt in any workweek when more than five employees "are employed in the establishment in such operations," as previously explained (see §§ 780.712 through 780.715). Nor is any employee within the exemption in a workweek when he is not employed "by" the establishment within the meaning of section 13(b)(14) (see §§ 780.716 through 780.719). This is in accordance with the general rule that the unit of time to be used in determining the application of the Act and its exemptions to an employee is the workweek. (See Overnight Motor Transportation Co. v. Missel, 316 U.S. Mitchell v. Hunt, 263 F. 2d 913; McComb v. Puerto Rico Tobacco Marketing Co-op. Ass'n, 80 F. Supp. 953, affirmed 181 F. 2d 697.) A workweek is a fixed and regularly recurring interval of seven consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted.

§ 780.722 Exempt workweeks.

An employee performing work for an establishment commonly recognized as a country elevator is exempt under section 13(b)(14) in any workweek when he is, for the entire workweek, employed "by" such establishment, if no more than five employees are "employed in the establishment in such operations", and if the "area of production" requirement is met.

§ 780.723 Exempt and nonexempt employment.

Under section 13(b)(14), where an employee, for part of his workweek, is employed "by" an "exempt" establishment (one commonly recognized as a country elevator which has five employees or less employed in the establishment in such operations in that workweek) and the employee is, in his employment by the establishment, employed "within the area of production" as defined by the regulations, but in the remainder of the workweek is employed by his employer in an establishment or in activities not within this or another exemption provided by the Act, in the course of which he performs any work to which the Act applies, the employee is, not exempt for any part of that workweek (see Mitchell v. Hunt, 263 F. 2d 913; Waialua v. Maneja, 77 F. Supp. 480; Walling v. Peacock Corp., 58 F. Supp. 880; McComb v. Puerto Rico Tobacco Marketing Co-op. Ass'n, 181 F. 2d 697).

§ 780.724 Work exempt under another section of the Act.

Where an employee's employment during part of his workweek would qualify for exemption under section 13(b)(14) if it continued throughout the workweek, and the remainder of his workweek is spent in employment which, if it continued throughout the workweek, would qualify for exemption under another section or sections of the Act, the exemptions may be combined (see Remington v. Shaw (W.D. Mich.) 2 WH Cases 262). The employee, however, qualifies for exemption only to the extent of the exemption which is more limited in scope (see Mitchell v. Hunt, 263 F. 2d 913). For example, if part of the work is exempt from both minimum wage and overtime compensation under one section of the Act and the rest is exempt only from the overtime pay provisions under another section, the employee is exempt that week from the overtime provisions, but not from the minimum wage requirements. In this connection, attention is directed to another exemption in the Act which relates to work in grain elevators, which may apply in appropriate circumstances, either in combination with section 13(b)(14) or to employees for whom the requirements of section 13(b)(14) cannot be met. This other exemption is that provided by section 7(c). Section 7(c), which is discussed in Part 526 of this chapter, provides a limited overtime exemption for employees employed in the seasonal industry of storing grain in country grain elevators, public terminal and sub-terminal elevators, wheat flour mills, nonelevator bulk storing establishments and flat warehouses, § 526.10(b)(14) of this chapter.

Subpart I—Employment in Ginning of Cotton and Processing of Sugar Beets, Sugar-Beet Molasses, Sugarcane, or Maple Sap into Sugar or Syrup; Exemption From Overtime Pay Requirements Under Section 13(b)(15)

INTRODUCTORY

§ 780.800 Scope and significance of interpretative bulletin.

Subpart A of this Part 780 and this Subpart I constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(15) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for two industries (a) for employees engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities and (b) for employees engaged in the processing of sugar beets, sugar-beet molasses, sugarcane or maple sap, into sugar (other than refined sugar) or syrup. The limited overtime exemptions provided for cotton ginning and for sugar processing under sections 7(c) and 7(d) (see Part 526 of this chapter) are not discussed in this subpart.

§ 780.801 Statutory provisions.

Section 13(b)(15) of the Fair Labor Standards Act exempts from the overtime requirements of section 7:

> Any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (other than refined sugar) or syrup.

Section 13(b)(15) supplants two exemptions that were contained in the Act prior to the Fair Labor Standards Amendments of 1966. The first is former section 13(a)(13), having identical language, which provided a complete exemption for those employed in the ginning of cotton. The second is the former section 7(c) which provided an overtime exemption for the employees of an employer engaged in sugar processing operations resulting in unrefined sugar or syrup.

§ 780.802 What determines application of the exemption.

It is apparent from the language of section 13(b)(15) that the application of this exemption depends upon the nature and purpose of the work performed by the individual employee for whom exemption is sought, and in the case of ginning of cotton on the location of the place of employment where the work is done and other factors as well. It does not depend upon the character of the business of the employer. A determination of whether an employee is exempt therefore requires an examination of that employee's duties. Some employees of the employer may be exempt while others may not.

§ 780.803 Basic conditions of exemption; first part, ginning of cotton.

Under the first part of section 13(b)(15) of the Act, the ginning of cotton, all the following conditions must be met in order for the exemption to apply to an employee:

(a) He must be "engaged in ginning."

(b) The commodity ginned must be cotton.

(c) The ginning of the cotton must be "for market."

(d) The place of employment in which this work is done must be "located in a county where cotton is grown in commercial quantities." The following sections discuss the meaning and application of these requirements.

GINNING OF COTTON FOR MARKET

§ 780.804 "Ginning" of cotton.

The term "ginning" refers to operations performed on "seed cotton" to separate the seeds from the spinnable fibers. (Moore v. Farmer's Manufacturing and Ginning Co., 51 Ariz., 378, 77 F. 2d 209; Frazier v. Stone, 171 Miss. 56, 156 So. 596). "Seed cotton" is cotton in its natural state (Burchfield v. Tanner, 142 Tex. 404, 178 S.W. 2d 681, 683) and the ginning to which section 13(b)(15) refers is the "first processing" of this agricultural commodity (107 Cong. Rec. (daily ed.) p. 5887), which converts it into the marketable product commonly known as "lint cotton" (Wirtz v. Southern Pickery Inc. (W.D. Tenn.) 278 F. Supp. 729; Mangan v. State, 76 Ala. 60, 66) by removing the seed from the lint and then pressing and wrapping the lint into bales.

§ 780.805 Ginning of "cotton."

Only the ginning of "cotton" is within the first Part of the exemption. An employee engaged in ginning of moss, for example, would not be exempt. The reconditioning of cotton waste resulting from spinning or oil mill operations is not included, since such waste is not the agricultural commodity in its natural state for whose first processing the exemption was provided. (See 107 Cong. Rec. (daily ed.) p. 5887.) The "cotton," "seed cotton," and "lint cotton" ginned by ordinary gins do not include "linter" or "Grabbot" cotton, obtained by reginning cotton seed and hard locks of cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning (Mississippi Levee Com'rs v. Refuge Cotton Oil Co., 91 Miss. 480, 44 So. 828, 829). Mote ginning, the process whereby raw motes (leaves, trash, sticks, dirt, and immature cotton with some cottonseed) are run through a ginning process to extract the short-fiber cotton, is not included in the ginning of cotton unless it is done as a part of the whole ginning process in one gin establishment as a continuous and uninterrupted series of operations resulting in useful cotton products including the regular "gin" bales, the "mote" bales (short-fiber cotton), and the cottonseed.

§ 780.806 Exempt ginning limited to first processing.

As indicated in § 780.804, the ginning for which the exemption is intended is the first processing of the agricultural commodity, cotton, in its natural form, into lint cotton for market. It does not include further operations which may be performed on the cottonseed or the cotton lint, even though such operations are performed in the same establishment where the ginning is done. Delinting, which is the removal of short fibers and fuzz from cottonseed, is not exempt under section 13(b)(15). It is not first processing of the seed cotton; rather, it is performed on cottonseed, usually in cottonseed processing establishments, and even if regarded as ginning (Mitchell v. Burgess, 239 F. 2d 484) it is not the ginning of cotton for market contemplated by section 13(b)(15). It may come within the overtime exemption provided in section 7(d) of the Act for certain seasonal industries. (See § 526.11(b)(1) of Part 526 of this chapter.) Compressing of cotton, which is the pressing of bales into higher density bales than those which come from the gin, is a further processing of the cotton entirely removed from ginning (Peacock v. Lubbock Compress Co., 252 F. 2d 892). Employees engaged in compressing may, however, be subject to exemption from overtime pay under section 7(c). (See § 526.10(b)(8) of Part 526 of this chapter.)

§ 780.807 Cotton must be ginned "for market."

As noted in § 780.804, it is ginning of seed cotton which converts the cotton to marketable form. Section 13(b)(15), however, provides an exemption only where the cotton is actually ginned "for market." (Wirtz v. Southern Pickery, Inc. (W.D. Tenn.) 278 F. Supp. 729.) The ginning of cotton for some other purpose is not exempt work. Cotton is not ginned "for market" if it is not to be marketed in the form in which the ginning operation leaves it. Cotton is not ginned "for market" if it is being ginned preliminary to further processing operations to be performed on the cotton by the same employer before marketing the commodity in an altered form. (Compare Mitchell v. Park (D. Minn.), 14 WH Cases 43, 36 Labor Cases 65, 191; Bush v. Wilson & Co., 157 Kans. 82, 138 P. 2d 457; Gaskin v. Clell Coleman & Sons, 2 WH Cases 977.)

EMPLOYEES "ENGAGED IN" GINNING

§ 780.808 Who may qualify for the exemption generally.

The exemption applies to "any employee engaged in" ginning of cotton. This means that the exemption may apply to an employee so engaged, no matter by whom he is employed. Employees of the gin operator, of an independent contractor, or of a farmer may come within the exemption in any workweek when all other conditions of the exemption are met. To come within the exemption, however, an employee's work must be an integral part of ginning of cotton, as previously described. The courts have uniformly held that exemptions in the Act must be construed strictly to carry out the purpose of the Act. (See § 780.2, in Subpart A of this Part 780.) No operation in which an employee engages in a place of employment where cotton is ginned is exempt unless it comes within the meaning of the term "ginning."

§ 780.809 Employees engaged in exempt operations.

Employees engaged in actual ginning operations, as described in § 780.804 will come within the exemption if all other conditions of section 13(b)(15) are met. The following activities are among those within the meaning of the term "engaged in ginning of cotton":

(a) "Spotting" vehicles in the gin yard or in nearby areas before or after being weighed.

(b) Moving vehicles in the gin yard or from nearby areas to the "Suction" and reparking them subsequently.

(c) Weighing the seed cotton prior to ginning, weighing lint cotton and seed subsequent to ginning (including preparation of weight records and tickets in connection with weighing operations).

(d) Placing seed cotton in temporary storage at the gin and removing the cotton from such storage to be ginned.

(e) Operating the suction feed.

(f) Operating the gin stands and power equipment.

(g) Making gin repairs during the ginning season.

(h) Operating the press, including the handling of bagging and ties in connection with the ginning operations of that gin.

(i) Removing bales from the press to holding areas on or near the gin premises.

(j) Others whose work is so directly and physically connected with the ginning process itself that it constitutes an integral part of its actual performance.

§ 780.810 Employees not "engaged in" ginning.

Since an employee must actually be "engaged in" ginning of cotton to come within the exemption, an employee engaged in other tasks, not an integral part of "ginning" operations, will not be exempt. (See, for rule that only the employees performing the work described in the exemption are exempt, Wirtz v. Burton Mercantile and Gin Co., Inc., 234 F. Supp. 825, aff'd per curiam 338 F. 2d 414, cert. denied 380 U.S. 965; Wirtz v. Kelso Gin Co., Inc. (E.D. Ark.) 50 Labor Cases 31, 631, 16 WH Cases 663; Mitchell v. Stinson, 217 F. 2d 210; Phillips v. Meeker Cooperative Light and Power Ass'n 63 F. Supp. 743, affirmed 158 F. 2d 698; Jenkins v. Durkin, 208 F. 2d 941; Heaburg v. Independent Oil Mill, Inc., 46 F. Supp. 751; Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969.) The following activities are among those not within the meaning of the term "engaged in ginning of cotton":

(a) Transporting seed cotton from farms or other points to the gin.

(b) General maintenance work (as opposed to operating repairs).

(c) General office and custodial duties.

(d) "Watching" duties.

(e) Working in the seed house.

(f) Transporting seed, hulls, and ginned bales away from the gin.

(g) Any activity performed during the "off-season."

COUNTY WHERE COTTON IS GROWN IN COMMERCIAL QUANTITIES

§ 780.811 Exemption dependent upon place of employment generally.

Under the first part of section 13(b)(15), if the employee's work meets the requirements for exemption, the location of the place of employment where he performs it will determine whether the exemption is applicable. This location is required to be in a county where cotton is grown in commercial quantities. The exemption will apply, however, to an employee who performs such work in "any" place of employment in such a county. The place of employment in which he engages in ginning need not be an establishment exclusively or even principally devoted to such operations; nor is it important whether the place of employment is on a farm or in a town or city in such a county, or whether or to what extent the cotton ginned there comes from the county in which the ginning is done or from nearby or distant sources. It is enough if the place of employment where the employee is engaged in ginning cotton for market is "located" in such a county.

§ 780.812 "County."

As used in the section 13(b)(15) exemption, the term "county" refers to the political subdivision of a State commonly known as such, whether or not such a unit bears that name in a particular State. It would, for example, refer to the political subdivision known as a "parish" in the State of Louisiana. A place of employment would not be located in a county, within the meaning of the exemption, if it were located in a city which, in the particular State, was not a part of any county.

§ 780.813 "County where cotton is grown."

For the exemption to apply, the employee must be ginning cotton in a place of employment in a county where cotton "is grown" in the described quantities. It is the cotton grown, not the cotton ginned in the place of employment, to which the quantity test is applicable. The quantities of cotton ginned in the county do not matter, so long as the requisite quantities are grown there.

§ 780.814 "Grown in commercial quantities."

Cotton must be "grown in commercial quantities" in the county where the place of employment is located if an employee ginning cotton in such place is to be exempt under section 13(b)(15). The term "commercial quantities" is not defined in the statute, but in the cotton-growing areas of the country there should be little question in most instances as to whether commercial quantities of cotton are grown in the county where the ginning is done. If it should become necessary to determine whether commercial quantities are grown in a particular county, it would appear appropriate in view of crop-year variations to consider average quantities produced over a representative period such as 5 years. On the question of whether the quantities grown are "commercial" quantities, the trade understanding of what are "commercial" quantities of cotton would be important. It would appear appropriate also to measure "commercial" quantities in terms of marketable lint cotton in bales rather than by acreage or amounts of seed cotton grown, since seed cotton is not a commercially marketable product (Mangan v. State, 76 Ala. 60). Also, production of a commodity in "commercial" quantities generally involves quantities sufficient for sale with a reasonable expectation of some return to the producers in excess of costs (Bianco v. Hess (Ariz.), 339 P. 2d 1038; Nystel v. Thomas (Tex. Civ. App.) 42 S.W. 2d 168).

§ 780.815 Basic conditions of exemption; second part, processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.

Under the second part of section 13(b)(15) of the Act, the following conditions must be met in order for the exemption to apply to an employee:

(a) He must be engaged in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap.

(b) The product of the processing must be sugar (other than refined sugar) or syrup.

§ 780.816 Processing of specific commodities.

Only the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap is within the exemption. Operations performed on commodities other than those named are not exempt under this section even though they result in the production of unrefined sugar or syrup. For example, sorghum cane or refinery syrup (which is a byproduct of refined syrup) are not named commodities and employees engaged in processing these products are not exempt under this section even though the resultant product is raw sugar. The loss of exemption would obtain for the same reason for employees engaged in processing sugar, glucose, or ribbon cane syrup into syrup.

§ 780.817 Employees engaged in processing.

Only those employees who are engaged in the processing will come within the exemption. The processing of sugarcane to which the exemption applies and in which the employee must be engaged in order to come within it is considered to begin when the processor receives the cane for processing and to end when the cane is processed "into sugar (other than refined sugar) or syrup." Employees engaged in the following activities of a sugarcane processing mill are considered to be engaged in "the processing of" the sugarcane into the named products, within the meaning of the exemption:

(a) Loading of the sugarcane in the field or at a concentration point and hauling the cane to the mill "if performed by employees of the mill." (Such activities performed by employees of some other employer, such as an independent contractor, are not considered to be within the exemption.)

(b) Weighing, unloading, and stacking the cane at the mill yard.

(c) Performing sampling tests (such as a trash test or sucrose content test) on the incoming cane.

(d) Washing the cane, feeding it into the mill crushers and crushing.

(e) Operations on the extracted cane juice in the making of raw sugar and molasses: Juice weighing and measurement, heating, clarification, filtration, evaporating, crystallization, centrifuging, and handling and storing the raw sugar or molasses at the plant during the grinding season.

(f) Laboratory analytical and testing operations at any point in the processing or at the end of the process.

(g) Loading out raw sugar or molasses during the grinding season.

(h) Handling, baling, or storing bagasse during the grinding season.

(i) Firing boilers and other activities connected with the overall operation of the plant machinery during grinding operations, including cleanup and maintenance work and day-to-day repairs. (This includes shop employees, mechanics, electricians, and employees maintaining stocks of various items used in repairs.)

§ 780.818 Employees not engaged in processing.

Employees engaged in operations which are not an integral part of processing of the named commodities will not come within the exemption. The following activities are not considered exempt under section 13(b)(15):

(a) Office and general clerical work.

(b) Feeding and housing millhands and visitors (typically this is called the "boarding house").

(c) Hauling raw sugar or molasses away from the mill.

(d) Any work outside the grinding season.

§ 780.819 Production must be of unrefined sugar or syrup.

The second part of the section 13(b)(15) exemption is specifically limited to the production "of sugar (other than refined sugar) or syrup." The production of "refined sugar" a term which is commonly understood to refer to the refinement of "raw sugar" is expressly excluded. Thus, the exemption does not apply to the manufacture of sugar that is produced by melting sugar, purifying the melted sugar solution through a carbon medium process and the recrystallization of the sugar from this solution. Nor does the exemption apply to the processing of cane syrup into refined sugar or to the further processing of sugar, as for example, beet sugar into powdered or liquid sugar.

Subpart J—Employment in Fruit and Vegetable Harvest Transportation; Exemption From Overtime Pay Requirements Under Section 13(b)(16)

INTRODUCTORY

§ 780.900 Scope and significance of interpretative bulletin.

Subpart A of this Part 780 and this Subpart J together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(16) of the Fair Labor Standards Act of 1938, as amended. This section provides exemption from the overtime pay provisions of the Act for employees engaging in specified transportation activities when fruits and vegetables are harvested. As appears more fully in Subpart A of this part, interpretations in this bulletin with respect to the provisions of the Act discussed are official interpretations upon which reliance may be placed and which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act. The general exemption provided in sections 13(a)(6) and 13(b)(12) of the Act for employees employed in agriculture, are not discussed in this subpart except in their relation to section 13(b)(16). The meaning and application of these exemptions are fully considered in Subparts D and E, respectively, of this Part 780.

§ 780.901 Statutory provisions.

Section 13(b)(16) of the Act exempts from the overtime provisions of section 7:

> Any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables.

§ 780.902 Legislative history of exemption.

Since the language of section 13(b)(16) and its predecessor, section 13(a)(22) is identical, the legislative history of former section 13(a)(22) still retains its pertinency and vitality. The former section 13(a)(22) was added to the Act by the Fair Labor Standards Amendments of 1961. The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. It would have altered the effect of holdings of the courts that operations such as those described in the amendment are not within the agriculture exemption provided by section 13(a)(6) when performed by employees of persons other than the farmer. (Chapman v. Durkin, 214 F. 2d 360, certiorari denied 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363, certiorari denied, 348 U.S. 897.) The amendment was offered to exempt operations which, in the sponsor's view, were meant to be exempt under the original Act. (See 107 Cong. Rec. (daily ed.) p. 4523.) The Conference Committee, in changing the provision to make it a separate exemption made it clear that is was "not intended by the committee of conference to change by this exemption (for the described transportation employees) * * * the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts." (H. Rept. No. 327, 87th Cong., first session, p. 18.)

§ 780.903 General scope of exemption.

The exemption provided by section 13(b)(16) is in two parts, subsection (A), which exempts employees engaged in the described transportation and preparation for transportation of fruits or vegetables, and subsection (B) which exempts employees engaged in the specified transportation of employees who harvest fruits or vegetables. The transportation and preparation for transportation of fruits and vegetables must be from the farm to a place of first processing or first marketing located in the same State where the farm is located; the transportation of harvesters must be between the farm and a place located in the same State as the farm.

§ 780.904 What determines the exemption.

The application of the exemption provided by section 13(b)(16) depends on the nature of the employee's work and not on the character of the employer's business. An employee is not exempt in any workweek unless his employment in that workweek meets all the requirements for exemption. To determine whether an employee is exempt an examination should be made of the duties which that employee performs. Some employees of the employer may be exempt and others may not.

§ 780.905 Employers who may claim exemption.

A nonfarmer, as well as a farmer, who has an employee engaged in the operations specified in section 13(b)(16) may take advantage of the exemption. Employees of contractual haulers, packers, processors, wholesalers, "bird-dog" operators, and others may qualify for exemption. If an employee is engaged in the specified operations, the exemption will apply "whether or not" these operations are "performed by the farmer" who has grown the harvested fruits and vegetables. Where such operations are performed by the farmer, the engagement by his employee in them will provide a basis for exemption under section 13(b)(16) without regard to whether the farmer is performing the operations as an incident to or in conjunction with his farming operations.

EXEMPT OPERATIONS ON FRUITS OR VEGETABLES

§ 780.906 Requisites for exemption generally.

Section 13(b)(16), in clause (A), provides an exemption from the overtime pay provision of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged "in the transportation and preparation for transportation of fruits and vegetables"; and

(b) Such transportation must be transportation "from the farm"; and

(c) The destination to which the fruits or vegetables are transported must be "a place of first processing or first marketing"; and

(d) The transportation must be from the farm to such destination "within the same State".

§ 780.907 "Fruits or vegetables."

The exempt operations of preparing for transportation and transporting must be performed with respect to "fruits or vegetables." The intent of section 13(b)(16) is to exempt such operations on fruits or vegetables which are "just-harvested" and still in their raw and natural state. As explained at the time of adoption of the amendment on the floor of the House, the exemption was intended to eliminate the difference in treatment of farmers and nonfarmers with respect to exemption of such "handling or hauling of fruit or vegetables in their raw or natural state." (See 107 Cong. Rec. (daily ed.) p. 4523.) Transporting and preparing for transportation other farm products which are not fruits or vegetables are not exempt under section 13(b)(16). For example, operations on livestock, eggs, tobacco, or poultry are nonexempt. Sugarcane is not a fruit or vegetable for purposes of this exemption (Wirtz v. Osceola Farms Co., 372 F. 2d 584).

§ 780.908 Relation of employee's work to specified transportation.

In order for the exemption to apply to an employee, he must be engaged "in the transportation and preparation for transportation" of the just-harvested fruits or vegetables from the farm to the specified places within the same State. Engagement in other activities is not exempt work. The employee must be actually engaged in the described operations. The exemption is not available for other employees of the employer, such as office, clerical, and maintenance workers.

§ 780.909 "Transportation."

"Transportation," as used in section 13(b)(16), refers to the movement by any means of conveyance of fruits or vegetables from the farm to a place of first processing or first marketing in the same State. It includes only those activities which are immediately necessary to move the fruits or vegetables to the specified points and the return trips. Drivers, drivers' helpers, loaders, and checkers perform work which is exempt. Transportation ends with delivery at the receiving platform of the place to which the fruits or vegetables are transported. (Mitchell v. Budd, 350 U.S. 473.) Thus, unloading at the delivery point by employees who did not transport the commodities would not be a part of the transportation activities under section 13(b)(16).

§ 780.910 Engagement in transportation and preparation.

Since transportation and preparation for transportation are both exempt activities, an employee who engages in both is performing exempt work. In referring to "the transportation and preparation for transportation" of the fruits or vegetables, the statute recognizes the two activities as interrelated parts of the single task of moving the commodities from the farm to the designated points. Accordingly, the word "and" between the words "transportation" and "preparation" is not considered to require that any employee be employed in both parts of the task in order to be exempt. The exemption may apply to an employee engaged either in transporting or preparing the commodities for transportation if he otherwise qualifies under section 13(b)(16).

§ 780.911 Preparation for transportation.

The "preparation for transportation" of fruits or vegetables includes only those activities which are necessary to prepare the fruits or vegetables for transportation from the farm to the places described in section 13(b)(16). These preliminary activities on the farm will vary with the commodity involved, with the means of the transportation to be used, and with the nature of operations to be performed on the commodity after delivery.

§ 780.912 Exempt preparation.

The following operations, if required in order to move the commodities from the farm and to deliver them to a place of first marketing or first processing, are considered preparation for transportation: Assembling, weighing, placing the fruits or vegetables in containers such as lugs, crates, boxes or bags, icing, marking, labeling or fastening containers, and moving the commodities from storage or concentration areas on the farm to loading sites.

§ 780.913 Nonexempt preparation.

(a) *Retail packing.* Since the exemption, as expressly stated in section 13(b)(16), includes the transportation of the fruits or vegetables only to places of first marketing or first processing, packing or preparing for retail or further distribution beyond the place of first processing or first marketing is not exempt as "preparation for transportation." (Schultz v. Durrence (D. Ga.), 19 WH Cases 747, 63 CCH Lab. Cas. secs. 32, 387.)

(b) *Preparation for market.* No exemption is provided under section 13(b)(16) for operations performed on the farm in preparation for market (such as ripening, cleaning, grading, or sorting) rather than in preparation for the transportation described in the section. Exemption, if any, for these activities should be considered under sections 13(a)(6) and 13(b)(12). (See Subparts D and E of this Part 780.)

(c) *Processing or canning.* Processing is not exempt preparation for transportation. Thus, the canning of fruits or vegetables is not under section 13(b)(16).

§ 780.914 "From the farm."

The exemption applies only to employees whose work relates to transportation of fruits or vegetables "from the farm." The phrase "from the farm" makes it clear that the preparation of the fruits or vegetables should be performed on the farm and that the first movement of the commodities should commence at the farm. A "farm" has been interpreted under the Act to mean a tract of land devoted to one or more of the primary branches of farming outlined in the definition of "agriculture" in section 3(f) of the Act. These expressly include the cultivation and tillage of the soil and the growing and harvesting of any agricultural or horticultural commodities.

§ 780.915 "Place of first processing."

Under section 13(b)(16) the fruits or vegetables may be transported to only two types of places. One is a "place of first processing", which includes any place where canning, freezing, drying, preserving, or other operations which first change the form of the fresh fruits or vegetables from their raw and natural state are performed. (For overtime exemption applicable to "first processing," see Part 526 of this chapter.) A plant which grades and packs only is not a place of first processing (Walling v. DeSoto Creamery and Produce Co., 51 F. Supp. 938). However, a packer's plant may qualify as a place of first marketing. (See § 780.916.)

§ 780.916 "Place of * * * first marketing."

A "place of * * * first marketing" is the second of the two types of places to which the freshly harvested fruits or vegetables may be transported from the farm under the exemption provided by section 13(b)(16). Typically, a place of first marketing is a farmer's market of the kind to which "delivery to market" is made within the meaning of section 3(f) of the Act when a farmer delivers such commodities there as an incident to or in conjunction with his own farming operations. Under section 13(b)(16), of course, there is no requirement that the transportation be performed by or for a farmer or as an incident to or in conjunction with any farming operations. A place of first marketing may be described in general terms as a place at which the freshly harvested fruits or vegetables brought from the farm are first delivered for marketing, such as a packing plant or an establishment of a wholesaler or other distributor, cooperative marketing agency, or processor to which the fruits or vegetables are first brought from the farm and delivered for sale. A place of first marketing may also be a place of first processing (see Mitchell v. Budd, 350 U.S. 473) but it need not be. The "first place of packing" to which the just-harvested fruits or vegetables are transported from the farm is intended to be included. (See 107 Cong. Rec. (daily ed.) p. 4523.) Transportation to places which are not first processing or first marketing places is not exempt.

§ 780.917 "Within the same State."

To qualify for exemption under section 13(b)(16), the transportation of the fruits or vegetables must be made to the specified places "within the same State" in which the farm is located. Transportation is made to a place "within the same State" when the commodities are taken from the farm, hauled and delivered within the same State to first markets or first processors for sale or processing at the place of delivery. The exemption is not provided for transportation to any place of first marketing or first processing across State lines and does not apply to any part of the transportation within the State of fruits or vegetables destined for a place in another State at which they are to be first marketed or first processed. Transportation from the farm to an intermediate point in such a journey located within the same State would not qualify for exemption; it would make no difference that the intermediate point is a place of first marketing or first processing for other fruits or vegetables if it is not actually such for the fruits or vegetables being transported. On the other hand, where the place to which fruits or vegetables are transported from the farm within the same State is actually the place of first marketing or first processing of those very commodities, transportation of the goods across State lines by the first-market operator or first processor, after such delivery to him within the State, does not affect the nature of the delivery to him as one made within the State.

EXEMPT TRANSPORTATION OF FRUIT OR VEGETABLE HARVEST EMPLOYEES

§ 780.918 Requisites for exemption generally.

Section 13(b)(16), in clause (B), provides an exemption from the minimum wage and overtime pay provisions of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged "in transportation" of harvest workers; and

(b) The harvest workers transported must be "persons employed or to be employed in the harvesting of fruits or vegetables"; and

(c) The employee's transportation of such harvest workers must be "between the farm and any point within the same State."

§ 780.919 Engagement "in transportation" of harvest workers.

In order for the exemption to apply, the employees must be engaged "in transportation" of the specified harvest workers between the points stated in the statute. Actual engagement "in transportation" of such workers is required. Engagement in other activities is not exempt work. Drivers, driver's helpers, and others who are engaged in the actual movement of the persons transported may qualify for the exemption. Office employees, garage mechanics, and other employees of the employer who may perform supporting activities but do not engage in the actual transportation work do not come within the exemption. There is no restriction in the statute as to the means of conveyance used; the exempt transportation may be by land, air, or water in any vehicle or conveyance appropriate for the purpose. Employees of any employer who are engaged in the specified transportation activities may qualify for exemption; it is not necessary that the transportation be performed by the farmer. (See § 780.905.)

§ 780.920 Workers transported must be fruit or vegetable harvest workers.

Clause (B) of section 13(b)(16) exempts only those transportation employees who are engaged in transportation "of persons employed or to be employed in the harvesting of fruits or vegetables." Transportation of harvest workers is not exempt unless the workers are fruit and vegetable harvest workers; transportation of workers employed or to be employed in harvesting or other commodities is not exempt work under section 13(b)(16). Wirtz v. Osceola Farms Co., 372 F. (2d) 584 (C.A. 5). Nor does the exemption apply to the transportation of persons for the purpose of planting or cultivating any crop, whether or not it is a fruit or a vegetable crop.

§ 780.921 Persons "employed or to be employed" in fruit or vegetable harvesting.

The exemption applies to the transportation of persons "employed or to be employed" in the harvesting of fruits or vegetables. Included in this phrase are persons who at the time of transportation are currently employed in harvesting fruits or vegetables and others who, regardless of their occupation at such time, are being transported to be employed in such harvesting. The conveying of persons to a farm from a factory, packinghouse or processing plant would be exempt where their transportation is for the purpose of their employment in harvesting the named commodities. On the other hand, the transportation of harvest workers, who have been employed in the fruit or vegetable harvest, to such a plant for the purpose of their employment in the plant would not be exempt. The transportation must come within the the intended scope of section 13(b)(16) which is to provide exemption for "transportation of the harvest crew to and from the farm" (see 107 Cong. Rec. daily ed. p. 4523).

§ 780.922 "Harvesting" of fruits or vegetables.

Only transportation of employees employed or to be employed in the "harvesting" of fruits or vegetables is exempt under clause (B) of section 13(b)(16). As indicated in § 780.920, such harvest workers do not include employees employed or to be employed in planting or cultivating the crop. Nor do they include employees employed or to be employed in operations subsequent to harvesting, even where such operations constitute "agriculture" within the definition in section 3(f) of the Act. "Harvesting" refers to the removal of fruits or vegetables from their growing position in the fields, and as explained in § 780.118 of this part, includes the operations customarily performed in connection with this severance of the crops from the soil (see Vives v. Serralles, 145 F. 2d 552), but does not extend to operations subsequent to and unconnected with the actual severance process or to operations performed off the farm. It may include moving the fruits or vegetables to concentration points on the farm, but would not include packingshed or other operations performed in preparation for market rather than as part of harvesting, such as ripening, cleaning, grading, sorting, drying, and storing. If the workers are employed or to be employed in "harvesting", it does not matter for purposes of the exemption whether a farmer or someone else employs them or does the harvesting. It is the character of their employment as "harvesting" and not the identity of their employer or the owner of the crop which determines whether their transportation to and from the farm will provide a basis for exemption of the transportation of employees.

§ 780.923 "Between the farm and any point within the same State."

The transportation of fruit or vegetable harvest workers is permitted "between the farm and any point within the same State". The exempt transportation of such harvest workers therefore includes their movement to and from the farm (see 107 Cong. Rec. (daily ed.) p. 4523). Such transportation must, however, be from or to points "within the same State" in which the farm is located. Crossing of State lines is not contemplated. Thus, the exemption would not apply to day-haul transportation of fruit or vegetable harvest workers between a town in one State and farms located in another State. Also, the intent to exempt "transportation of the harvest crew to and from the farm" (see 107 Cong. Rec. (daily ed.) p. 4523) within a single State would not justify exemption of the transportation of workers from one State to another to engage in harvest work in the latter State. The exemption does not apply to transportation of persons on any trip, or any portion of a trip, in which the point of origin or point of destination is in another State. Subject to these limitations, however, where employees are being transported for employment in harvesting they may be picked up in any place within the State, including other farms, packing or processing establishments, factories, transportation terminals, and other places. The broad term "any point" must be interpreted in the light of the purpose of the exemption to facilitate the harvesting of fruits or vegetables. Transportation from a farm to "any point" within the same State (such as a factory or processing plant) where some other purpose than harvesting is served is not exempt.

Subpart K—Employment of Homeworkers in Making Wreaths; Exemption From Minimum Wage, Overtime Compensation, and Child Labor Provisions Under Section 13(d)

INTRODUCTORY

§ 780.1000 Scope and significance of interpretative bulletin.

Subpart A of this Part 780 and this Subpart K together constitute the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(d) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the minimum wage, overtime pay, and child labor provisions of the Act for certain homeworkers employed in making wreaths from evergreens and in harvesting evergreens and other forest products for use in making wreaths. Attention is directed to the fact that a limited overtime exemption for employees employed in the decoration greens industry is provided under section 7(c) of the Act (see Part 526 of this chapter). The section 7(c) exemption is not limited to homeworkers.

§ 780.1001 General explanatory statement.

Workers in rural areas sometimes engage, as a family unit, around the Christmas holidays, in gathering evergreens and making them into wreaths in their homes. Such workers, under well-settled interpretations by the Department of Labor and the courts, have been held to be employees of the firm which purchases the wreaths and furnishes the workers with wire used in making such wreaths.

REQUIREMENTS FOR EXEMPTION

§ 780.1002 Statutory requirements.

Section 13(d) of the Fair Labor Standards Act exempts from the minimum wage provisions of section 6, the overtime requirements of section 7 and the child labor restrictions of section 12:

> Any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

§ 780.1003 What determines the application of the exemption.

The application of this exemption depends on the nature of the employee's work and not on the character of the employer's business. To determine whether an employee is exempt an examination should be made of the activities which that employee performs and the conditions under which he performs them. Some employees of the employer may be exempt and others may not.

§ 780.1004 General requirements.

The general requirements of the exemption are that:

(a) The employee must be a homeworker;

(b) The employee must be engaged in making wreaths as a homeworker;

(c) The wreaths must be made principally of evergreens;

(d) Any harvesting of the evergreens and other forest products by the homeworkers must be for use in making the wreaths by homeworkers.

§ 780.1005 Homeworkers.

The exemption applies to "any homeworker." A homeworker within the meaning of the Act is a person who works for an employer in or about a home, apartment, tenement, or room in a residential establishment.

§ 780.1006 In or about a home.

Whether the work of an employee is being performed "in or about a home," so that he may be considered a homeworker, must be determined on the facts in the particular case. In general, however the phrase "in or about a home" includes any home, apartment, or other dwelling place and surrounding premises, such yards, garages, sheds or basements. A convent, orphanage or similar institution is considered a home.

§ 780.1007 Exemption is inapplicable if wreath-making is not in or about a home.

The section 13(d) exemption does not apply when the wreaths are made in or about a place which is not considered a "home". Careful consideration is required in many cases to determine whether work is being performed in or about a home. Thus, the circumstances under which an employee may engage in work in what ostensibly is a "home" may require the conclusion, on an examination of all the facts, that the work is not being performed in or about a home within the intent of the term and for purposes of section 13(d) of the Act.

§ 780.1008 Examples of places not considered homes.

The following are examples of workplaces which, on examination, have been considered not to be a "home":

(a) Living quarters allocated to and regularly used solely for production purposes, where workers work regular schedules and are under constant supervision by the employer, are not considered to be a home.

(b) While a convent, orphanage or similar institution is considered a home, an area in such place which is set aside for and used for sewing or other productive work under supervision is not a home.

(c) Where an employee performs work on wreaths in a home and also engages in work on the wreaths for the employer during that workweek in a factory, he is not exempt in that week, since some of his work is not performed in a home.

§ 780.1009 Wreaths.

The only product which may be produced under the section 13(d) exemption by a homeworker is a wreath having no less than the specified evergreen content. The making of a product other than a wreath is nonexempt even though it is made principally of evergreens.

§ 780.1010 Principally.

The exemption is intended to apply to the making of an evergreen wreath. Such a wreath is one made "principally" of evergreens. "Principally" means chiefly, in the main or mainly (Hartford Accident and Indemnity Co. v. Casualty Underwriters Insurance Co., 130 F. Supp. 56). A wreath is made "principally" of evergreens when it is comprised mostly of evergreens. For example, where a wreath is composed of evergreens and other kinds of material, the evergreens should comprise a greater part of the wreath than all the other materials together, including materials such as frames, stands, and wires. The principal portion of a wreath may consist of any one or any combination of the evergreens listed in section 13(d), including "other evergreens." The making of wreaths in which natural evergreens are a secondary component is not exempt.

§ 780.1011 Evergreens.

The material which must principally be used in making the wreaths is listed as "natural holly, pine, cedar, or other evergreens." Other plants or materials cannot be used to satisfy this requirement.

§ 780.1012 Other evergreens.

The "other evergreens" of which the wreath may be principally made include any plant which retains its greenness through all the seasons of the year, such as laurel, ivy, yew, fir, and others. While plants other than evergreens may be used in making the wreaths, such plants, whether they are forest products cultivated plants, cannot be considered as part of the required principal evergreen component of the wreath.

§ 780.1013 Natural evergreens.

Only "natural" evergreens may comprise the principal part of the wreath. The word "natural" qualifies all of the evergreens listed in the section, including "other evergreens." The term "natural" means that the evergreens at the time they are being used in making a wreath must be in the raw and natural state in which they have been harvested. Artificial evergreens (Herring Magic v. U.S., 258 F. 2d 197; Cal. Casualty Indemnity Exchange v. Industrial Accident Commission of Cal. 90 P. 2d 289) or evergreens which have been processed as by drying and spraying with tinsel or by other means are not included. It is immaterial whether the natural evergreen used in making a wreath has been cultivated or is a product of the woods or forest.

§ 780.1014 Harvesting.

The homeworker is permitted to harvest evergreens and other forest products to be used in making the wreath. The word "harvesting" means the removal of evergreens and other forest products from their growing positions in the woods or forest, including transportation of the harvested products to the home of the homeworker and the performance of other duties necessary for such harvesting.

§ 780.1015 Other forest products.

The homeworker may also harvest "other forest products" for use in making wreaths. The term "other forest products" means any plant of the forest and includes, of course, deciduous plants as well.

§ 780.1016 Use of evergreens and forest products.

Harvesting of evergreens and other forest products is exempt only when these products will be "used in making such wreaths." The phrase "used in making such wreaths" places a definite limitation on the purpose for which evergreens may be harvested under section 13(d). Harvesting of these materials for a use other than making wreaths is nonexempt. Also, such harvesting is nonexempt when the evergreens are used for wreath-making by persons other than the homeworkers (see Mitchell v. Hunt, 263 F. 2d 913). For example, harvesting of evergreens for sale or distribution to an employer who uses them in his factory to make wreaths is not exempt.

PART 782—EXEMPTION FROM MAXIMUM HOURS PROVISIONS FOR CERTAIN EMPLOYEES OF MOTOR CARRIERS

Sec.
782.0 Introductory statement.
782.1 Statutory provisions considered.
782.2 Requirements for exemption in general.
782.3 Drivers.
782.4 Drivers' helpers.
782.5 Loaders.
782.6 Mechanics.
782.7 Interstate commerce requirements of exemption.
782.8 Special classes of carriers.

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201 et seq.

Source: 36 FR 21778, Nov. 13, 1971, unless otherwise noted.

§ 782.0 Introductory statement.

(a) Since the enactment of the Fair Labor Standards Act of 1938, the views of the Administrator of the Wage and Hour Division as to the scope and applicability of the exemption provided by section 13(b)(1) of the act have been expressed in interpretations issued from time to time in various forms. This part, as of the date of its publication in the Federal Register, supersedes and replaces such prior interpretations. Its purpose is to make available in one place general interpretations of the Administrator which will provide "a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it." (Skidmore v. Swift & Co., 323 U.S. 134)

(b) The interpretations contained in this part indicate, with respect to the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, the construction of the law which the Secretary of Labor and the Administrator believe to be correct in the light of the decisions of the courts, the Interstate Commerce Commission, and since October 15, 1966, its successor, the Secretary of Transportation, and which will guide them in the performance of their administrative duties under the act unless and until they are otherwise directed by authoritative decisions of the courts or conclude upon reexamination of an interpretation that it is incorrect.

(c) Pub. L. 89-670 (80 Stat. 931) transferred to and vested in the Secretary of Transportation all functions, powers, and duties of the Interstate Commerce Commission (1) under section 204 (a)(1) and (a)(2) to the extent they relate to qualifications and maximum hours of service of employees and safety of operations and equipment, and (2) under section 204(a)(5) of the Motor Carrier Act. The interpretations contained in this part are interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act (Pub. L. 49, 80th Cong., first sess. (61 Stat. 84), discussed in Part 790, statement on effect of Portal-to-Portal Act of 1947), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

§ 782.1 Statutory provisions considered.

(a) Section 13(b)(1) of the Fair Labor Standards Act provides an exemption from the maximum hours and overtime requirements of section 7 of the act, but not from the minimum wage requirements of section 6. The exemption is applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935, (Part II of the Interstate Commerce Act, 49 Stat. 546, as amended; 49 U.S.C. 304, as amended by Pub. L. 89-670, section 8e which substituted "Secretary of Transportation" for "Interstate Commerce Commission"—Oct. 15, 1966) except that the exemption is not applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service solely by virtue of section 204(a)(3a) of Part II of the Interstate Commerce Act. (Pub. L. 939, 84th Cong., second sess., Aug. 3, 1956, secs. 2 and 3) The Fair Labor Standards Act confers no authority on the Secretary of Labor or the Administrator to extend or restrict the scope of this exemption. It is settled by decisions of the U.S. Supreme Court that the applicability of the exemption to an employee otherwise entitled to the benefits of the Fair Labor Standards Act is determined exclusively by the existence of the power conferred under section 204 of the Motor Carrier Act to establish qualifications and maximum hours of service with respect to him. It is not material whether such qualifications and maximum hours of service have actually been established by the Secretary of Transportation; the controlling consideration is whether the employee comes within his power to do so. The exemption is not operative in the absence of such power, but an employee with respect to whom the Secretary of Transportation has such power is excluded, automatically, from the benefits of section 7 of the Fair Labor Standards Act. (Southland Gasoline Co. v. Bayley, 319 U.S. 44; Boutell v. Walling, 327 U.S. 463; Levinson v. Spector Motor Service, 330 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Morris v. McComb, 332 U.S. 422)

(b) Section 204 of the Motor Carrier Act, 1935, provides that it shall be the duty of the Interstate Commerce Commission (now that of the Secretary of Transportation (see § 782.0(c))) to regulate common and contract carriers by motor vehicle as provided in that act, and that "to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment." (Motor Carrier Act, sec. 204(a)(1)(2), 49 U.S.C. 304(a)(1)(2)) Section 204 further provides for the establishing of similar regulations with respect to private carriers of property by motor vehicle, if need therefor is found. (Motor Carrier Act, sec. 204(a)(3), 49 U.S.C. 304(a)(3))

(c) Other provisions of the Motor Carrier Act which have a bearing on the scope of section 204 include those which define common and contract carriers by motor vehicle, motor carriers, private carriers of property by motor vehicle (Motor Carrier Act, sec. 203(a) (14), (15), (16), (17), 49 U.S.C. sec. 303(a) (14), (15), (16), (17)) and motor vehicle (Motor Carrier Act, sec. 203(a)(13)); those which confer regulatory powers with respect to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce (Motor Carrier Act, sec. 202(a)), as defined in the Motor Carrier Act, sec. 203(a) (10), (11), and reserve to each State the exclusive exercise of the power of regulation of intrastate commerce by motor carriers on its highways (Motor Carrier Act, sec. 202(b)); and those which expressly make section 204 applicable to certain transportation in interstate or foreign commerce which is in other respects excluded from regulation under the act. (Motor Carrier Act, sec. 202(c))

§ 782.2 Requirements for exemption in general.

(a) The exemption of an employee from the hours provisions of the Fair Labor Standards Act under section 13(b)(1) depends both on the class to which his employer belongs and on the class of work involved in the employee's job. The power of the Secretary of Transportation to establish maximum hours and qualifications of service of employees, on which exemption depends, extends to those classes of employees and those only who (1) are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act (Boutell v. Walling, 327 U.S. 463; Walling v. Casale, 51 F. Supp. 520; and see Ex parte Nos. MC-2 and MC-3, in the Matter of Maximum Hours of Service of Motor Carrier Employees, 28 M.C.C. 125, 132), and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act. United States v. American Trucking Assns., 310 U.S. 534; Levinson v. Spector Motor Service, 330 U.S. 649; Ex parte No. MC-28, 13 M.C.C. 481; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Walling v. Comet Carriers, 151 F. (2d) 107 (C.A. 2).

(b) (1) The carriers whose transportation activities are subject to the Secretary of Transportation jurisdiction are specified in the Motor Carrier Act itself (see § 782.1). His jurisdiction over private carriers is limited by the statute to private carriers of property by motor vehicle, as defined therein, while his jurisdiction extends to common and contract carriers of both passengers and property. See also the discussion of special classes of carriers in § 782.8. And see paragraph (d) of this section. The U.S. Supreme Court has accepted the Agency determination, that activities of this character are included in the kinds of work which has been defined as the work of drivers, driver's helpers, loaders, and mechanics (see §§ 782.3 to 782.6) employed by such carriers, and that no other classes of employees employed by such carriers perform duties directly affecting such "safety of operation." Ex parte No. MC-2, 11 M.C.C. 203; Ex parte No. MC-28, 13 M.C.C. 481; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Levinson v. Spector Motor Service, 330 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Southland Gasoline Co. v. Bayley, 319 U.S. 44. See also paragraph (d) of this section and §§ 782.3 through 782.8.

(2) The exemption is applicable, under decisions of the U.S. Supreme Court, to those employees and those only whose work involves engagement in activities consisting wholly or in part of a class of work which is defined (i) as that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649; Morris v. McComb, 332 U.S. 442. Although the Supreme Court recognized that the special knowledge and experience required to determine what classifications of work affects safety of operation of interstate motor carriers was applied by the Commission, it has made it clear that the determination whether or not an individual employee is within any such classification is to be determined by judicial process. (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Cf. Missel v. Overnight Motor Transp., 40 F. Supp. 174 (D. Md.), reversed on other grounds 126 F. (2d) 98 (C.A. 4), affirmed 316 U.S. 572; West v. Smoky Mountains Stages, 40 F. Supp. 296 (N.D. Ga.); Magann v. Long's Baggage Transfer Co., 39 F. Supp. 742 (W.D. Va.); Walling v. Burlington Transp. Co. (D. Nebr.), 5 W.H. Cases 172, 9 Labor Cases par. 62,576; Hager v. Brinks, Inc., 6 W.H. Cases 262 (N.D. Ill.)) In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Porter v. Poindexter, 158 F.—(2d) 759 (C.A. 10); Keeling v. Huber & Huber Motor Express, 57 F. Supp. 617 (W.D. Ky.); Crean v. Moran Transp. Lines (W.D. N.Y.) 9 Labor Cases, par. 62,416 (see also earlier opinion in 54 F. Supp. 765)); what is controlling is the character of the activities involved in the performance of his job.

(3) As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is (or, in the case of a member of a group of drivers, driver's helpers, loaders, or mechanics employed by a common carrier and engaged in safety-affecting occupations, that he is likely to be) called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b)(2) of this paragraph, he comes within the exemption in all workweeks when he is employed at such job. This general rule assumes that the activities involved in the continuing duties of the job in all such workweeks will include activities which have been determined to affect directly the safety of operation of motor vehicles on the public highways in transportation in interstate commerce. Where this is the case, the rule applies regardless of the proportion of

the employee's time or of his activities which is actually devoted to such safety-affecting work in the particular workweek, and the exemption will be applicable even in a workweek when the employee happens to perform no work directly affecting "safety of operation." On the other hand, where the continuing duties of the employee's job have no substantial direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis, the exemption will not apply to him in any workweek so long as there is no change in his duties. (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Morris v. McComb, 332 U.S. 422; Levinson v. Spector Motor Service, 330 U.S. 649; Rogers Cartage Co. v. Reynolds, 166 F. (2d) 317 (C.A. 6); Opelika Bottling Co. v. Goldberg, 299 F. (2d) 37 (C.A. 5); Tobin v. Mason & Dixon Lines, Inc., 102 F. Supp. 466 (E.D. Tenn.)) If in particular workweeks other duties are assigned to him which result, in those workweeks, in his performance of activities directly affecting the safety of operation of motor vehicles in interstate commerce on the public highways, the exemption will be applicable to him those workweeks, but not in the workweeks when he continues to perform the duties of the non-safety-affecting job.

(4) Where the same employee of a carrier is shifted from one job to another periodically or on occasion, the application of the exemption to him in a particular workweek is tested by application of the above principles to the job or jobs in which he is employed in that workweek. Similarly, in the case of an employee of a private carrier whose job does not require him to engage regularly in exempt safety-affecting activities described in paragraph (b)(1) of this section and whose engagement in such activities occurs sporadically or occasionally as the result of his work assignments at a particular time, the exemption will apply to him only in those workweeks when he engages in such activities. Also, because the jurisdiction of the Secretary of Transportation over private carriers is limited to carriers of property (see paragraph (b)(1) of this section) a driver, driver's helper, loader, or mechanic employed by a private carrier is not within the exemption in any workweek when his safety-affecting activities relate only to the transporation of passengers and not to the transportation of property.

(c) The application of these principles may be illustrated as follows:

(1) In a situation considered by the U.S. Supreme Court, approximately 4 percent of the total trips made by drivers employed by a common carrier by motor vehicle involved in the hauling of interstate freight. Since it appeared that employer, as a common carrier, was obligated to take such business, and that any driver might be called upon at any time to perform such work, which was indiscriminately distributed among the drivers, the Court considered that such trips were a natural, integral, and apparently inseparable part of the common carrier service performed by the employer and driver employees. Under these circumstances, the Court concluded that such work, which directly affected the safety of operation of the vehicles in interstate commerce, brought the entire classification of drivers employed by the carrier under the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service, so that all were exempt even though the interstate driving on particular employees was sporadic and occasional, and in practice some drivers would not be called upon for long periods to perform any such work. (Morris v. McComb, 332 U.S. 422)

(2) In another situation, the U.S. Court of Appeals (Seventh Circuit) held that the exemption would not apply to truckdrivers employed by a private carrier on interstate routes who engaged in no safety-affecting activities of the character described above even though other drivers of the carrier on interstate routes were subject to the jurisdiction of the Motor Carrier Act. The court reaffirmed the principle that the exemption depends not only upon the class to which the employer belongs but also the activities of the individual employee. (Goldberg v. Faber Industries, 291 F. (2d) 232)

(d) The limitations, mentioned in paragraph (a) of this section, on the regulatory power of the Secretary of Transportation (as successor to the Interstate Commerce Commission) under section 204 of the Motor Carrier Act are also limitations on the scope of the exemption. Thus, the exemption does not apply to employees of carriers who are not carriers subject to his jurisdiction, or to employees of noncarriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, firms engaged in the leasing and renting of motor vehicles to carriers and in keeping such vehicles in condition for service pursuant to the lease or rental agreements. (Boutell v. Walling, 327 U.S. 463; Walling v. Casale, 51 F. Supp. 520). Similarly, the exemption does not apply to an employee whose job does not involve engagement in any activities which have been defined as those of drivers, drivers' helpers, loaders, or mechanics, and as directly affecting the "safety of operation" of motor vehicles. (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649; United States v. American Trucking Assn., 310 U.S. 534; Gordon's Transports v. Walling, 162 F. (2d) 203 (C.A. 6); Porter v. Poindexter, 158 F. (2d) 759 (C.A. 10)) Except insofar as the Commission has found that the activities of drivers, drivers' helpers, loaders, and mechanics, as defined by it, directly affect such "safety of operation," it has disclaimed its power to establish qualifications of maximum hours of service under section 204 of the Motor Carrier Act. (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695) "Safety of operation" as used in section 204 of the Motor Carrier Act means "the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone." (Ex parte Nos. MC-2 and MC-3 (Conclusions of Law No. 1), 28 M.C.C. 125, 139) Thus the activities of drivers, drivers' helpers, loaders, or mechanics in connection with transportation which is not in interstate of foreign commerce within the meaning of the Motor Carrier Act provide no basis for exemption under section 13(b)(1) of the Fair Labor Standards Act. (Walling v. Comet Carriers, 151 F. (2d) 107 (C.C.A. 2); Hansen v. Salinas Valley Ice Co. (Cal. App.) 144 P. (2d) 896; Reynolds v. Rogers Cartage Co., 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds, 166 F. (d) 317 (C.A. 6); Earle v. Brinks, Inc., 54 F. Supp. 676 (S.D. N.Y.); Walling v. Villaume Box & Lumber Co., 58 F. Supp. 150 (D. Minn.); Hager v. Brinks, Inc., 11 Labor Cases, par. 63,296 (N.D. Ill.), 6 W.H. Cases 262; Walling v. DeSoto Creamery & Produce Co., 51 F. Supp. 938 (D. Minn.); Dallum v. Farmers Cooperative Trucking Assn., 46 F. Supp. 785 (D. Minn.); McLendon v. Bewely Mills (N.D. Tex.); 3 Labor Cases, par. 60,247, 1 W.H. Cases 934; Gibson v. Glasgow (Tenn. Sup. Ct.), 157 S.W. (2d) 814; cf. Morris v. McComb, 332 U.S. 422. See also § 782.1 and §§ 782.7 through 782.8.)

(e) The jurisdiction of the Secretary of Transportation under section 204 of the Motor Carrier Act relates to safety of operation of motor vehicles only, and "to the safety of operation of such vehicles on the highways of the country, and that alone." (Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 192. See also United States v. American Trucking Assns., 319 U.S. 534, 548.) Accordingly, the exemption does not extend to employees merely because they engage in activities affecting the safety of operation of motor vehicles operated on private premises. Nor does it extend to employees engaged solely in such activities as operating freight and passenger elevators in the carrier's terminals of moving freight or baggage therein or the docks or streets by hand trucks, which activities have no connection with the actual operation of motor vehicles. (Gordon's Transport v. Walling, 162 F. (2d) 203 (C.A. 6), certorari denied 322 U.S. 774; Walling v. Comet Carriers, 57 F. Supp. 1018, affirmed, 151 F. (2d) 107 (C.A. 2), certiorari dismissed, 382 U.S. 819; Gibson v. Glasgow (Tenn. Sup. Ct.), 157 S.W. (2d) 814; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 128. See also Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Serv., 330 U.S. 949.)

(f) Certain classes of employees who are not within the definitions of drivers, driver's helpers, loaders, and mechanics are mentioned in §§ 782.3-782.6, inclusive. Others who do not come within these definitions include the following, whose duties are considered to affect safety of operation, if at all, only indirectly; stenographers (including those who write letters relating to safety or prepare accident reports); clerks of all classes (including rate clerks, billing clerks, clerks engaged in preparing schedules, and filing clerks in charge of filing accident reports, hours-of-service records, inspection reports, and similar documents); foremen, warehousemen, superintendents, salesmen, and employees acting in an executive capacity. (Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Ex parte No. MC-28, 13 M.C.C. 481. But see §§ 782.5(b) and 782.6(b) as to certain foremen and superintendents.) Such employees are not within the section 13(b)(1) exemption. (Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (rate clerk who performed incidental duties as cashier and dispatcher); Levinson v. Spector Motor Service, 330 U.S. 649; Porter v. Poindexter, 158 F. (2d) 759 (C.A. 10) (checker of freight and bill collector); Potashnik, Local Truck System v. Archer (Ark. Sup. Ct.), 179 S.W. (2d) 696 (night manager who did clerical work on waybills, filed day's accumulation of bills and records, billed out local accumulation of shipments, checked mileage on trucks and made written reports, acted as night dispatcher, answered telephone calls, etc.).)

§ 782.3 Drivers.

(a) A "driver," as defined for Motor Carrier Act jurisdiction (49 CFR Parts 390-395; Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C.1; Ex parte No. MC-4, 1 M.C.C. 1), is an individual who drives a motor vehicle in transporation which is, within the meaning of the Motor Carrier Act, in interstate or foreign commerce. (As to what is considered transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act, see § 782.7). This definition does not require that the individual be engaged in such work at all times; it is recognized that even full-duty drivers devote some of their working time to activities other than such driving. "Drivers," as thus officially defined, include, for example, such partial-duty drivers as the following, who drive in interstate or foreign commerce as part of a job in which they are required also to engage in other types of driving or nondriving work: Individuals whose driving duties are concerned with transportation some of which is in intrastate commerce and some of which is in interstate or foreign commerce within the meaning of the Motor Carrier Act; individuals who ride on motor vehicles engaged in transportation in interstate or foreign commerce and act as assistant or relief drivers of the vehicles in addition to helping with loading, unloading, and similar work; drivers of chartered buses or of farm trucks who have many duties unrelated to driving or safety of operation of their vehicles in interstate transportation on the highways; and so-called "driver-salesmen" who devote much of their time to selling goods rather than to activities affecting such safety of operation. (Levinson v. Spector Motor Service, 300 U.S. 649; Morris v. McComb, 332 U.S. 422; Richardson v. James Gibbons Co., 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44; Gavril v. Kraft Cheese Co., 42 F. Supp. 702 (N.D. Ill.); Walling v. Craig, 53 F. Supp. 479 (D. Minn.); Vannoy v. Swift & Co. (Mo. S. Ct.), 201 S.W. (2d) 350; Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Ex parte No. MC-4, 1 M.C.C. 1. Cf. Colbeck v. Dairyland Creamery Co. (S.D. Supp. Ct.), 17 N.W. (2d) 262, in which the court held that the exemption did not apply to a refrigeration mechanic by reason solely of the fact that he crossed State lines in a truck in which he transported himself to and from the various places at which he serviced equipment belonging to his employer.)

(b) The work of an employee who is a full-duty or partial-duty "driver," as the term "driver" is above defined, directly affects "safety of operation" within the meaning of section 204 of the Motor Carrier Act whenever he drives a motor vehicle in interstate or foreign commerce within the meaning of that act. (Levinson v. Spector Motor Service, 330 U.S. 649, citing Richardson v. James Gibbons Co., 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44; Morris v. McComb, 332 U.S. 422; Ex parte No. MC-28, 13 M.C.C. 481, 482, 488; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 139 (Conclusion of Law No. 2). See also Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte No. MC-4, 1 M.C.C. 1.) The Secretary has power to establish, and has established, qualifications and maximum hours of service for such drivers employed by common and contract carriers or passengers or property and by private carriers of property pursuant to section 204, of the Motor Carrier Act. (See Ex parte No. MC-4, 1 M.C.C. 1; Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte No. MC-28, 13 M.C.C. 481; Levinson v. Spector Motor Service, 330 U.S. 649; Southland Gasoline Co. v. Bayley, 319 U.S. 44; Morris v. McComb, 332 U.S. 422; Safety Regulations (Carriers by Motor Vehicle), 49 CFR Parts 390, 391, 395) In accordance with principles previously stated (see § 782.2), such drivers to whom this regulatory power extends are, accordingly, employees exempted from the overtime requirements of the Fair Labor Standards Act by section 13(b)(1). (Southland Gasoline Co. v. Bayley, 319 U.S. 44; Levinson v. Spector Motor Service, 330 U.S. 649; Morris v. McComb, 332 U.S. 422; Rogers Cartage Co. v. Reynolds, 166 F. (2d) 317 (C.A. 6). This does not mean that an employee of a carrier who drives a motor vehicle is exempted as a "driver" by virtue of that fact alone. He is not exempt if his job never involves transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act (see §§ 782.2 (d) and (e), 782.7, and 782.8, or if he is employed by a private carrier and the only such transportation called for by his job is not transportation of property. (See § 782.2. See also Ex parte No. MC-28, 13 M.C.C. 481, Cf. Colbeck v. Dairyland Creamery Co. (S. Ct. S.D.), 17 N.W. (2d) 262 (driver of truck used only to transport himself to jobsites, as an incident of his work in servicing his employer's refrigeration equipment, held non exempt).) It has been held that so-called "hostlers" who "spot" trucks and trailers at a terminal dock for loading and unloading are not exempt as drivers merely because as an incident of such duties they drive the trucks and tractors in and about the premises of the trucking terminal. (Keegan v. Ruppert (S.D. N.Y.), 7 Labor Cases, par. 61,726 6 Wage Hour Rept. 676, cf. Walling v. Silver Fleet Motor Express, 67 F. Supp. 846)

§ 782.4 Drivers' helpers.

(a) A Driver's "helper," as defined for Motor Carrier Act jurisdiction (Ex Parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 135, 136, 138, 139), is an employee other than a driver, who is required to ride on a motor vehicle when it is being operated in interstate or foreign commerce within the meaning of the Motor Carrier Act. (The term does not include employees who ride on the vehicle and act as assistants or relief drivers. Ex parte Nos. MC-2 and MC-3, supra. See § 782.3.) This definition has classified all such employees, including armed guards on armored trucks and conductorettes on buses, as "helpers" with respect to whom he has power to establish qualifications and maximum hours of service because of their engagement in some or all of the following activities which, in his opinion, directly affect the safety of operation of such motor vehicles in interstate or foreign commerce (Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 135-136): Assist in loading the vehicles (they may also assist in unloading (Ex parte Nos. MC-2 and MC-3, supra), an activity which has been held not to affect "safety of operation," see § 782.5(c); as to what it meant by "loading" which directly affects "safety of operation," see § 782.5(a)); dismount when the vehicle approaches a railroad crossing and flag the driver across the tracks, and perform a similar duty when the vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway; in case of a breakdown, (1) place the flags, flares, and fuses as required by the safety regulations. (2) go for assistance while the driver protects the vehicle on the highway, or vice versa, or (3) assist the driver in changing tires or making minor repairs; and assist in putting on or removing chains.

(b) An employee may be a "helper" under the official definition even though such safety-affecting activities constitute but a minor part of his job. Thus, although the primary duty of armed guards on armored trucks is to protect the valuables in the case of attempted robberies, they are classified as "helpers" where they ride on such trucks being operated in interstate or foreign commerce, because, in the case of an accident or other emergency and in other respects, they act in a capacity somewhat similar to that of the helpers described in the text. Similary, conductorettes on buses whose primary duties are to see to the comfort of the passengers are classified as "helpers" whose such buses are being operated in interstate or foreign commerce, because in instances when accidents occur, they help the driver in obtaining aid and protect the vehicle from oncoming traffic.

(c) In accordance with principles previously stated (see § 782.2), the section 13(b)(1) exemption applies to employees who are, under the Secretary of Transporation's definitions, engaged in such activities as full- or partial-duty "helpers" on motor vehicles being operated in transporation in interstate or foreign commerce within the meaning of the Motor Carrier Act. (Ispass v. Pyramid Motor Freight Corp., 152 F. (2d) 619 (C.A. 2); Walling v. McGinley Co. (E.D. Tenn.), 12 Labor Cases, par. 63,731, 6 W.H. Cases 916. See also Levinson v. Spector Motor Service, 330 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Dallum v. Farmers, Coop Trucking Assn. 46 F. Supp. 785 (D. Minn.).) The exemption has been held inapplicable to so-called helpers who ride on motor vehicles but do not engage in any of the activities of "helpers" which have been found to affect directly the safety of operation of such vehicles in interstate or foreign commerce. (Walling v. Gordon's Transports (W.D. Tenn.) 10 Labor Cases par. 62,934, 6 W.H. Cases 831, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied, 332 U.S. 774 (helpers on city "pickup and delivery trucks" where it was not shown that the loading in any manner affected safety of operation and the helper's activities were "in no manner similar" to those of a driver's helper in over-the-road operation).) It should be noted also that an employee, to be exempted as a driver's "helper" under the Secretary's definitions, must be "required" as part of his job to ride on a motor vehicle when it is being operated in interstate or foreign commerce; an employee of a motor carrier is not exempted as a "helper" when he rides on such a vehicle, not as a matter of fixed duty, but merely as a convenient means of getting himself to, from, or between places where he performs his assigned work. (See Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695, modifying, on other grounds, 152 F. (2d) 619 (C.A. 2).)

§ 782.5 Loaders.

(a) A "loader," as defined for Motor Carrier Act jurisdiction (Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 133, 134, 139), is an employee of a carrier subject to section 204 of the Motor Carrier Act (other than a driver or driver's helper as defined in §§ 782.3 and 782.4) whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country. A "loader" may be called by another name, such as "dockman," "stacker," or "helper," and his duties will usually also include unloading and the transfer of freight between the vehicles and the warehouse, but he engages, as a "loader," in work directly affecting "safety of operation" so long as he has responsibility when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized. (Levinson v. Spector Motor Service, 300 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Walling v. Gordon's Transport (W.D. Tenn.), 10

Labor Cases, par. 62,934, affirmed 162 F. (2) 203 (C.A. 6), certiorari denied 332 U.S. 774; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 133, 134)

(b) The section 13(b)(1) exemption applies, in accordance with principles previously stated (see § 782.2), to an employee whose job involves activities consisting wholly or in part of doing, or immediately directing, a class of work defined (1) as that of a loader, and (2) as directly affecting the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, since such an employee is an employee with respect to whom the Secretary of Transporation has power to establish qualifications and maximum hours of service. (Levinson v. Spector Motor Service, 330 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855; Walling v. Gordon's Transports (W.D. Tenn.); 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6) certiorari denied 332 U.S. 774; Tinerella v. Des Moines Transp. Co., 41 F. Supp. 798.) Where a checker, foreman, or other supervisor plans and immediately directs the proper loading of a motor vehicle as described above, he may come within the exemption as a partial-duty loader. (Levinson v. Spector Motor Service, 330 U.S. 649; Walling. v. Gordon's Transports (W.D. Tenn.), 10 Labor Cases, par. 62,934; affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; Walling v. Huber & Huber Motor Express, 67 F. Supp. 885; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Crean v. Moran Transporation Lines, 57 F. Supp. 212 (W.D. N.Y.). See also 9 Labor Cases, par. 62,416; Walling v. Commercial Motor Freight (S.D. Ind.), 11 Labor Cases, par. 63,451; Hogla v. Porter (E.D. Okla.), 11 Labor Cases, par. 63,389 6 W. H. Cases 608.)

(c) An employee is not exempt as a loader where his activities in connection with the loading of motor vehicles are confined to classes of work other than the kind of loading described above, which directly affects "safety of operation." (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649) The mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual, or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of "loading" which directly affects "safety of operation." Thus the following activities have been held to provide no basis for exemption: Unloading; placing freight in convenient places in the terminal, checking bills of lading; wheeling or calling freight being loaded or unloaded; loading vehicles for trips which will not involve transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act; and activities relating to the preservation of the freight as distinguished from the safety of operation of the motor vehicles carrying such freight on the highways. (Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649; Porter v. Poindexter, 158 F. (2d) 759 (C.A. 10); McKeown v. Southern Calif. Freight Forwarders, 49 F. Supp. 543; Walling v. Gordon's Transports (W.D. Tenn.), 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Crean v. Moran Transp. Lines, 50 F. Supp. 107, 54 F. Supp. 765 (cf. 57 F. Supp. 212); Gibson v. Glasgow (Tenn. Sup. Ct.) 157 S.W. (2d) 814. See also Keeling v. Huber & Huber Motor Express, 57 F. Supp. 617.) As is apparent from opinion in Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, red caps of bus companies engaged in loading baggage on buses are not loaders engaged in work directly affecting safety of operation of the vehicles. In the same opinion, it is expressly recognized that there is a class of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect "safety of operations." Support for this conclusion is found in Wirtz v. C&P Shoe Corp. 335 F. (2d) 21 (C.A. 5), wherein the court held the loading of boxes of shoes, patterned on the last in, first out principle clearly was not of a safety affecting character "in view of the light weight of the cargo involved." In the case of coal trucks which are loaded from stockpiles by the use of an electric bridge crane and a mechanical conveyor, it has been held that employees operating such a crane or conveyor in the loading process are not exempt as "loaders" under section 13(b)(1). (Barrick v. South Chicago Coal & Dock Co. (N.D. Ill.), 8 Labor Cases, par. 62,242, affirmed 149 F. (2d) 960 (C.A. 7).) It seems apparent from the foregoing discussion that an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a "loader" merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure inplace, or even because he does the physical work of arranging pieces of freight in the vehicle where another employee tells him exactly what to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done. (See Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Yellow Transit Freight Lines Inc. v. Balven, 320 F. (2d) 495 (C.A. 8); Foremost Dairies v. Ivey, 204 F. (2d) 186 (C.A. 5); Ispass v. Pyramid Motor Freight Corp., 78 F. Supp. 475 (S.D. N.Y.); Mitchell v. Meco Steel Supply Co., 183 F. Supp. 779 (S.D. Tex.); Garton v. Sanders Transfer & Storage Co., 124 F. Supp. 84 (M.D. Tenn.); McKeown v. Southern Calif. Freight Forwarders, 49 F. Supp. 543; Walling v. Gordon's Transports (W.D. Tenn.) 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; Crean v. Moran Transporation Lines, 50 F. Supp. 107 (see also further opinion in 54 F. Supp. 765, and cf. the court's holding in 57 F. Supp. 212 with Walling v. Gordon's Transports, cited above). See also Levinson v. Spector Motor Service, 330 U.S. 649.) Such activities would not seem to constitute the kind of "loading" which directly affects the safety of operation of the loaded vehicle on the public highways, under the official definitions. (See Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 133, 134).

§ 782.6 Mechanics.

(a) A "mechanic," for purposes of safety regulations under the Motor Carrier Act is an employee who is employed by a carrier subject to the Secretary's jurisdiction under section 204 of the Motor Carrier Act and whose duty it is to keep motor vehicles operated in interstate or foreign commerce by his employer in a good and safe working condition. (Ex parte, Nos. MC-2 and MC-3, 28 M.C.C. 125, 132, 133. Ex parte No. MC-40 (Sub. No. 2), 88 M.C.C. 710 (repair of refrigeration equipment). See also Morris v. McComb, 332 U.S. 422.) It has been determined that the safety of operation of such motor vehicles on the highways is directly affected by those activities of mechanics, such as keeping the lights and brakes in a good and safe working condition, which prevent the vehicles from becoming potential hazards to highway safety and thus aid in the prevention of accidents. The courts have held that mechanics perform work of this character where they actually do inspection, adjustment, repair or maintenance work on the motor vehicles themselves (including trucks, tractors and trailers, and buses) and are, when so engaged, directly responsible for creating or maintaining physical conditions essential to the safety of the vehicles on the highways through the correction or prevention of defects which have a direct causal connection with the safe operation of the unit as a whole. (Walling v. Silver Bros., 136 F. (2d) 168 (C.A. 1); McDuffie v. Hayes Freight Lines, 71 F. Supp. 755; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Keeling v. Huber & Huber Motor Express, 57 F. Supp. 317; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855; Tinerella v. Des Moines Transp. Co., 41 F. Supp. 798; Robbins v. Zabarsky, 44 F. Supp. 867; West V. Smoky Mt. Stages, 40 F. Supp. 296; Walling v. Cumberland & Liberty

Mills Co. (S.D. Fla.), 6 Labor Cases, par. 61,184; Esibill v. Marshall (D. N.J.), 6 Labor Cases, par. 61,256; Keegan v. Ruppert (S.D. N.Y.), 7 Labor Cases, par. 61,726; Baker v. Sharpless Hendler Ice Cream Co. (E.D. Pa.), 10 Labor Cases, par. 62,956; Kentucky Transport Co. v. Drake (Ky. Ct. App.). 182 SW (2d) 960.) The following activities performed by mechanics on motor vehicles operated in interstate or foreign commerce are illustrative of the specific kinds of activities which the courts, in applying the foregoing principles, have regarded as directly affecting "safety of operation": The inspection, repair, adjustment, and maintenance for safe operation of steering apparatus, lights, brakes, horns, windshield wipers, wheels and axles, bushings, transmissions, differentials, motors, starters and ignition, carburetors, fifth wheels, springs and spring hangers, frames, and gasoline tanks (McDuffie v. Hayes Freight Lines, 71 F. Supp. 755; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Wolfe v. Union Transfer & Storage Co., 48 F. Supp. 855; Mason & Dixon Lines v. Ligon (Tenn. Ct. App.) 7 Labor Cases, par. 61,962; Walling v. Palmer, 67 F. Supp. 12; Kentucky Transport Co. v. Drake (Ky. Ct. App.), 182 SW (2d) 960.) Inspecting and checking air pressure in tires, changing tires, and repairing and rebuilding tires for immediate replacement on the vehicle from which they were removed have also been held to affect safety of operation directly. (Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Walling v. Palmer, 67 F. Supp. 12. See also McDuffie v. Hayes Freight Lines, 71 F. Supp. 755.) The same is true of hooking up tractors and trailers, including light and brake connections, and the inspection of such hookups. (Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; Walling v. Palmer, 67 F. Supp. 12. See also Walling v. Gordon's Transports (W.D. Tenn.). 10 Labor cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 744.)

(b) The section 13(b)(1) exemption applies, in accordance with principles previously stated (see § 782.2), to an employee whose job involves activities consisting wholly or in part of doing, or immediately directing, a class of work which, under the definitions referred to above, is that of a "mechanic" and directly affects the safety of operation of motor vehicles on the public highways in interstate or foreign commerce, within the meaning of the Motor Carrier Act. The power under the Motor Carrier Act to establish qualifications and maximum hours of service for such an employee has been sustained by the courts. (Morris v. McComb, 332 U.S. 422. See also Pyramid Motor Freight Corp. v. Ispass. 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649; Walling v. Silver Bros., 136 F. (2d) 168 (C.C.A. 1)). A supervisory employee who plans and immediately directs and checks the proper performance of this class of work may come within the exemption as a partial-duty mechanic. (Robbins. v. Zabarsky, 44 F. Supp. 867; Mason & Dixon Lines v. Ligon (Tenn. Ct. App.), 7 Labor Cases par. 61,962; cf. Morris v. McComb, 332 U.S. 422 and Levinson v. Spector Motor Service, 330 U.S. 649)

(c) (1) An employee of a carrier by motor vehicle is not exempted as a "mechanic" from the overtime provisions of the Fair Labor Standards Act under section 13(b)(1) merely because he works in the carrier's gargage, or because he is called a "mechanic," or because he is a mechanic by trade and does mechanical work. (Wirtz v. Tyler Pipe & Foundry Co., 369 F. 2d 927 (C.A. 5).) The exemption applies only if he is doing a class of work defined as that of a "mechanic", including activities which directly affect the safety of operation of motor vehicles in transporation on the public highways in interstate or foreign commerce. (Morris v. McComb, 332 U.S. 422; Keeling v. Huber & Huber Motor Express, 57 F. Supp. 617; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; McDuffie v. Hayes Freight Lines, 71 F. Supp. 755; Anuchick v. Transamerican Freight Lines, 46 F. Supp. 861; Walling v. Burlington Transp. Co. (D. Nebr.), 9 Labor Cases, par. 62,576. Compare Ex parte No. MC-40 (Sub. No. 2), 88 M.C.C. 710 with Colbeck v. Dairyland Creamery Co. (S.D. Sup. Ct.), 17 N.W.

(2d) 262. See also Pyramid Motor Freight Corp. v. Ispass 330 U.S. 695.) Activities which do not directly affect such safety of operation include those performed by employees whose jobs are confined to such work as that of dispatchers, carpenters, tarpaulin tailors vehicle painters, or servicemen who do nothing but oil, gas, grease, or wash the motor vehicles. (Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 132, 133, 135) To these may be added activities such as filling radiators, checking batteries, and the usual work of such employees as stockroom personnel, watchmen, porters, and garage employees performing menial nondiscretionary tasks or disassembling work. Employees whose work is confined to such "nonsafety" activities are not within the exemption, even though the proper performance of their work may have an indirect effect on the safety of operation of the motor vehicles on the highways. (Morris v. McComb, 332 U.S. 422; Campbell v. Riss & Co. (W.D. Mo.), 5 Labor Cases, par. 61,092 (dispatcher); McDuffie v. Hayes Freight Lines, 71 F. Supp. 755 (work of janitor and caretaker, carpentry work, body building, removing paint, preparing for repainting, and painting); Walling v. Silver Fleet Motor Express, 67 F. Supp. 846 (body building, construction work, painting and lettering); Hutchinson v. Barry, 50 F. Supp. 292 (washing vehicles); Walling v. Palmer, 67 F. Supp. 12 (putting water in radiators and batteries, oil and gas in vehicles, and washing vehicles); Anuchick v. Transamerican Freight Lines, 46 F. Supp. 861 (body builders, tarpaulin worker, stockroom boy, night watchman, porter); Bumpus v. Continental Baking Co. (W.D. Tenn.), 1 Wage Hour Cases 920 (painter), reversed on other grounds 124 F. (2d) 549; Green v. Riss & Co., 45 F. Supp. 648 (night watchman and gas pump attendant); Walling v. Burlington Transp. Co. (D. Nebr.), 9 Labor Cases, par. 62,576 (body builders); Keegan v. Ruppert (S.D. N.Y.), 7 Labor Cases, par. 61,726 (greasing and washing); Walling v. East Texas Freight Lines (N.D. Tex.), 8 Labor Cases, par. 62,083 (Menial tasks); Collier v. Acme Freight Lines, unreported (S.D. Fla., Oct. 1943) (same); Potashnik Local Truck System v. Archer (Ark. Sup. Ct.). 179 S.W. (2d) 696 (checking trucks in and out and acting as night dispatcher, among other duties); Overnight Motor Corp. v. Missel, 316 U.S. 572 (rate clerk with part-time duties as dispatcher).) The same has been held true of employees whose activities are confined to construction work, manufacture or rebuilding of truck, bus, or trailer bodies, and other duties which are concerned with the safe carriage of the contents of the vehicle rather than directly with the safety of operation on the public highways of the motor vehicle itself (Anuchick v. Transamerican Freight Lines, 46 F. Supp. 816; Walling v. Silver Fleet Motor Express, 67 F. Supp. 846; McDuffie v. Hayes Freight Lines 71 F. Supp. 755; Walling v. Burlington Transp. Co. (D. Nebr.), 9 Labor Cases, par. 62,576. Compare Colbeck v. Dairyland Creamery Co. (S.D. Sup. Ct.) 17 N.W. (2d) 262 with Ex parte No. MC-40 (Sub. No. 2), 88 M.C.C. 710.)

(2) The distinction between direct and indirect effects on safety of operation is exemplified by the comments in rejecting the contention in Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 135, that the activities of dispatchers directly affect safety of operation. It was stated: "It is contended that if a dispatcher by an error in judgment assigns a vehicle of insufficient size and weight-carrying capacity to transport the load, or calls a driver to duty who is sick, fatigued, or otherwise not in condition to operate the vehicle, or requires or permits the vehicle to depart when the roads are icy and the country to be traversed is hilly, an accident may result. While this may be true, it is clear that such errors in judgment are not the proximate causes of such accidents, and the dispatchers engage in no activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce."

(3) Similarly, the exemption has been held inapplicable to mechanics repairing and rebuilding parts, batteries, and tires removed from vehicles where a direct causal connection between their work and the safe operation of motor vehicles on the high-

ways is lacking because they do no actual work on the vehicles themselves and entirely different employees have the exclusive responsibility for determining whether the products of their work are suitable for use, and for the correct installation of such parts, on the vehicles. (Keeling v. Huber & Huber Motor Express, 57 F. Supp. 617; Walling v. Huber & Huber Motor Express, 67 F. Supp. 855) Mechanical work on motor vehicles of a carrier which is performed in order to make the vehicles conform to technical legal requirements rather than to prevent accidents on the highways has not been regarded by the courts as work directly affecting "safety of operation." (Kentucky Transport Co. v. Drake (Ky. Ct. App.), 182 S.W. (2d) 960; Anuchick v. Transamerican Freight Lines, 46 F. Supp. 861; Yellow Transit Freight Lines Inc. v. Balsen 320 F. (2d) 495 (C.A. 8)) And it is clear that no mechanical work on motor vehicles can be considered to affect safety of operation of such vehicles in interstate or foreign commerce if the vehicles are never in fact used in transportation in such commerce on the public highways. (Baker v. Sharpless Hendler Ice Cream Co. (E.D. Pa.), 10 Labor Cases, par. 62,956)

§ 782.7 Interstate commerce requirements of exemption.

(a) As explained in preceding sections of this part, section 13(b)(1) of the Fair Labor Standards Act does not exempt an employee of a carrier from the act's overtime provisions unless it appears, among other things, that his activities as a driver, driver's helper, loader, or mechanic directly affect the safety of operation of motor vehicles in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. What constitutes such transportation in interstate or foreign commerce, sufficient to bring such an employee within the regulatory power of the Secretary of Transportation under section 204 of that act, is determined by definitions contained in the Motor Carrier Act itself. These definitions are, however, not identical with the definitions in the Fair Labor Standards Act which determine whether an employee is within the general coverage of the wage and hours provisions as an employee "engaged in (interstate or foreign) commerce." For this reason, the interstate commerce requirements of the section 13(b)(1) exemption are not necessarily met by establishing that an employee is "engaged in commerce" within the meaning of the Fair Labor Standards Act when performing activities as a driver, driver's helper, loader, or mechanic, where these activities are sufficient in other respects to bring him within the exemption. (Hager v. Brinks, Inc. (N.D. Ill.), 11 Labor Cases, par. 63,296, 6 W.H. Cases 262; Earle v. Brinks, Inc., 54 F. Supp. 676 (S.D. N.Y.); Thompson v. Daugherty, 40 F. Supp. 279 (D. Md.). See also, Walling v. Villaume Box & Lbr. Co., 58 F. Supp. 150 (D. Minn.). And see in this connection paragraph (b) of this section and § 782.8.) To illustrate, employees of construction contractors are, within the meaning of the Fair Labor Standards Act, engaged in commerce where they operate or repair motor vehicles used in the maintenance, repair, or reconstruction of instrumentalities of interstate commerce (for example, highways over which goods and persons regularly move in interstate commerce). (Walling v. Craig, 53 F. Supp. 479 (D. Minn). See also Engbretson v. E. J. Albrecht Co., 150 F. (2d) 602 (C.A. 7); Overstreet v. North Shore Corp., 318 U.S. 125; Pedersen v. J. F. Fitzgerald Constr. Co., 318 U.S. 740, 742.) Employees so engaged are not, however, brought within the exemption merely by reason of that fact. In order for the exemption to apply, their activities, so far as interstate commerce is concerned, must relate directly to the transportation of materials moving in interstate or foreign commerce within the meaning of the Motor Carrier Act. Asphalt distributor-operators, although not exempt by reason of their work in applying the asphalt to the highways, are within the exemption where they transport to the road site asphalt moving in interstate commerce. See Richardson v. James Gibbons Co., 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44 (and see reference to this case in footnote 18 of Levinson v. Spector Motor Service, 330 U.S.

649); Walling v. Craig, 53 F. Supp. 479 (D. Minn.).

(b) (1) Highway transportation by motor vehicle from one State to another, in the course of which the vehicles cross the State line, clearly constitutes interstate commerce under both acts. Employees of a carrier so engaged, whose duties directly affect the safety of operation of such vehicles, are within the exemption in accordance with principles previously stated. (Southland Gasoline Co. v. Bayley, 319 U.S. 44; Plunkett v. Abraham Bros., 129 F. (2d) 419 (C.A. 6); Vannoy v. Swift & Co. (Mo. Sup. Ct.), 201 S.W. (2d) 350; Nelson v. Allison & Co. (E.D. Tenn.), 13 Labor Cases, par. 64,021; Reynolds v. Rogers Cartage Co. (W.D. Ky.), 13 Labor Cases, par. 63,978, reversed on other grounds 166 F. (2d) 317 (C.A. 6); Walling v. McGinley Co. (E.D. Tenn.), 12 Labor Cases, par. 63,731; Walling v. A. H. Phillips, Inc., 50 F. Supp. 749, affirmed (C.A. 1) 144 F. (2d) 102,324 U.S. 490. See §§ 782.2 through 782.8.) The result is no different where the vehicles do not actually cross State lines but operate solely within a single State, if what is being transported is actually moving in interstate commerce within the meaning of both acts; the fact that other carriers transport it out of or into the State is not material. (Morris v. McComb, 68 S. Ct. 131; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Walling v. Silver Bros. Co. 136 F. (2d) 168 (C.A. 1); Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331 (C.A. 8); Dallum v. Farmers Cooperative Trucking Assn., 46 F. Supp. 785 (D. Minn.); Gavril v. Kraft Cheese Co., 42 F. Supp. 702 (N.D. Ill.); Keegan v. Rupport (S.D. N.Y.), 7 Labor Cases, par. 61,726, 3 W.H. Cases 412; Baker v. Sharpless Hendler Ice Cream Co. (E.D. Pa.), 10 Labor Cases, par. 62,956, 5 W.H. Cases 926). Transportation within a single State is in interstate commerce within the meaning of the Fair Labor Standards Act where it forms a part of a "practical continuity of movement" across State lines from the point of origin to the point of destination. (Walling v. Jacksonville Paper Co., 317 U.S. 564; Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331 (C.A. 8); Walling v. American Stores Co., 133 F. (2d) 840 (C.A. 3); Baker v. Sharpless Hendler Ice Cream Co. (E.D. Pa.), 10 Labor Cases, par. 62,956 5 W.H. Cases 926) Since the interstate commerce regulated under the two acts is not identical (see paragraph (a) of this section), such transportation may or may not be considered also a movement in interstate commerce within the meaning of the Motor Carrier Act. Decisions of the Interstate Commerce Commission prior to 1966 seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Standards Act. (see § 782.8.) It is deemed necessary, however, as an enforcement policy only and without prejudice to any rights of employees under section 16 (b) of the Act, to assume that such a movement in interstate commerce under the Fair Labor Standards Act is also a movement in interstate commerce under the Motor Carrier Act, except in those situations where the Commission has held or the Secretary of Transportation or the courts hold otherwise. (See § 782.8(a); and compare Beggs v. Kroger Co., 167 F. (2d) 700, with the Interstate Commerce Commission's holding in Ex parte No. MC-48, 71 M.C.C. 17, discussed in paragraph (b) (2) of this section.) Under this enforcement policy it will ordinarily be assumed by the Administrator that the interstate commerce requirements of the section 13(b)(1) exemption are satisfied where it appears that a motor carrier employee is engaged as a driver, driver's helper, loader, or mechanic in transportation by motor vehicle which, although confined to a single State, is a part of an interstate movement of the goods or persons being thus transported so as to constitute interstate commerce within the meaning of the Fair Labor Standards Act. This policy does not extend to drivers, driver's helpers, loaders, or mechanics whose transportation activities are "in commerce" or "in the production of goods for commerce" within the meaning of the act but are not a part of an interstate movement of the goods or persons carried (see, e.g., Wirtz v. Crystal Lake Crushed Stone Co., 327 F. 2d 455 (C.A. 7)). Where, however, it has been authoritatively held that transportation of a particular character within a single State is not in interstate commerce as defined in the Motor Carrier Act (as has been done with respect to certain transportation of petroleum products from a terminal within a State to other points within the same State—see paragraph (b)(2) of this section), there is no basis for an exemption under section 13(b)(1), even though the facts may establish a "practical continuity of movement" from out-of-State sources through such in-State trip so as to make the trip one in interstate commerce under the Fair Labor Standards Act. Of course, engagement in local transportation which is entirely in intrastate commerce provides no basis for exempting a motor carrier employee. (Kline v. Wirtz, 373 F. 2d 281 (C.A. 5). See also paragraph (b) of this section.)

(2) The Interstate Commerce Commission held that transportation confined to points in a single State from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor, or water from an origin in a different State is not in interstate or foreign commerce within the meaning of part II of the Interstate Commerce Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment. See Ex parte No. MC-48 (71 M.C.C. 17, 29). The Commission specifically ruled that there is not fixed and persisting intent where (i) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage. In Baird v. Wagoner Transportation Co., 425 F. (2d) 407 (C.A. 6), the court found each of these factors to be present and held the intrastate transportation activities were not "in interstate commerce" within the meaning of the Motor Carrier Act and denied the section 13(b)(1) exemption. While ex parte No. MC-48 deals with petroleum and petroleum products, the decision indicates that the same reasoning applies to general commodities moving interstate into a warehouse for distribution (71 M.C.C. at 27). Accordingly, employees engaged in such transportation are not subject to the Motor Carrier Act and therefore not within the section 13(b)(1) exemption. They may, however, be engaged in commerce within the meaning of the Fair Labor Standards Act. (See in this connection, Mid-Continent Petroleum Corp. v. Keen, 157 F. 2d 310 (C.A. 8); DeLoach v. Crowley's Inc., 128 F. 2d 378 (C.A. 5); Walling v. Jacksonville Paper Co., 69 F. Supp. 599, affirmed 167 F. 2d 448, reversed on another point in 336 U.S. 187; and Standard Oil Co. v. Trade Commission, 340 U.S. 231, 238).

(c) The wage and hours provisions of the Fair Labor Standards Act are applicable not only to employees engaged in commerce, as defined in the act, but also to employees engaged in the production of goods for commerce. Employees engaged in the "production" of goods are defined by the act as including those engaged in "handling, transporting, or in any other manner working on such goods, or in closely related process or occupation directly essential to the production thereof, in any State." (Fair Labor Standards Act, sec. 3(j), 29 U.S.C., sec. 203(j), as amended by the Fair Labor Standards Amendments of 1949, 63 Stat. 910. See also the Division's Interpretative Bulletin, Part 776 of this chapter on general coverage of the wage and hours provisions of the act.) Where transportation of persons or property by motor vehicle between places within a State falls within this definition, and is not transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act because movement from points out of the State has ended or because movement to points out of the State has not yet begun, the employees engaged in connection with such transportation (this applies to employees of common, contract, and private carriers) are covered by the wage and hours provisions of the Fair Labor

Standards Act and are not subject to the jurisdiction of the Secretary of Transportation. Examples are: (1) Drivers transporting goods in and about a plant producing goods for commerce; (2) chauffeurs or drivers of company cars or buses transporting officers or employees from place to place in the course of their employment in an establishment which produces goods for commerces; (3) drivers who transport goods from a producer's plant to the plant of a processor, who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods; (4) drivers transporting goods between a factory and the plant of an independent contractor who performs operations on the goods, after which they are returned to the factory which further processes the goods for commerce; and (5) drivers transporting goods such as machinery or tools and dies, for example, to be used or consumed in the production of other goods for commerce. These and other employees engaged in connection with the transportation within a State of persons or property by motor vehicle who are subject to the Fair Labor Standards Act because engaged in the production of goods for commerce and who are not subject to the Motor Carrier Act because not engaged in interstate or foreign commerce within the meaning of that act, are not within the exemption provided by section 13(b)(1). (Walling v. Comet Carriers, 151 F. (2d) 107 (C.A. 2); Griffin Cartage Co. v. Walling, 153 F. (2d) 587 (C.A. 6); Walling v. Morris, 155 F. (2d) 832 (C.A. 6), reversed on other grounds in Morris v. McComb, 332 U.S. 422; West Kentucky Coal Co. v. Walling, 153 F. (2d) 582 (C.A. 6); Hamlet Ice Co. v. Fleming, 127 F. (2d) 165 (C.A. 4); Atlantic Co. v. Walling, 131 F. (2d) 518 (C.A. 5); Chapman v. Home Ice Co., 136 F. (2d) 353 (C.A. 6); Walling v. Griffin Cartage Co., 62 F. Supp. 396 (E.D. Mich.), affirmed 153 F. (2d) 587 (C.A. 6); Dallum v. Farmers Coop. Trucking Assn., 46 F. Supp. 785 (D. Minn.); Walling v. Villaume Box & Lbr. Co., 58 F. Supp. 150 (D. Minn); Walling v. DeSoto Creamery & Produce Co., 51 F. Supp. 938 (D. Minn.); Reynolds v. Rogers Cargate Co., 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds 166 F. (2d) 317 (C.A. 6), Hansen v. Salinas Valley Ice Co. (Cal. App.), 144 P. (2d) 896).

§ 782.8 Special classes of carriers.

(a) The Interstate Commerce Commission consistently maintained that transportation with a State of consumable goods (such as food, coal, and ice) to railroad, docks, etc., for use of trains and steamships is not such transportation as is subject to its jurisdiction. (New Pittsburgh Coal Co. v. Hocking Valley Ry. Co., 24 I.C.C. 244; Corona Coal Co. v. Secretary of War, 69 I.C.C. 389; Bunker Coal from Alabama to Gulf Ports, 227 I.C.C. 485.) The intrastate delivery of chandleries, including cordage, canvas, repair parts, wire rope, etc., to ocean-going vessels for use and consumption aboard such vessels which move in interstate or foreign commerce falls within this category. Employees of carriers so engaged are considered to be engaged in commerce, as that term is used in the Fair Labor Standards Act. These employees may also be engaged in the "production of goods for commerce" within the meaning of section 3(j) of the Fair Labor Standards Act. See cases cited in § 782.7(c), and see Mitchell v. Independent Ice Co., 294 F. 2d 186 (C.A. 5), certiorari denied 368 U.S. 952, and Part 776 of this chapter. Since the Commission has disclaimed jurisdiction over this type of operation (see, in this connection § 782.7(b)), it is the Division's opinion that drivers, driver's helpers, loaders, and mechanics employed by companies engaged in such activities are covered by the wage and hours provisions of the Fair Labor Standards Act, and are not within the exemption contained in section 13(b)(1). (See Hansen v. Salinas Valley Ice Co. (Cal. App.), 144 P. (2d) 896.)

(b) Prior to June 14, 1972, when the Department of Transportation published a notice in the FEDERAL REGISTER (37 FR 11781) asserting its power to establish qualifications and maximum hours of service of employees of contract mail haulers, thereby reversing the long-standing position of the Interstate Commerce Commission, the Administrator of the Wage and Hour

Division had taken the position that employees engaged in the transportation of mail under contract with the Postal Service were not within the exemption provided by section 13(b)(1) of the Fair Labor Standards Act. As the result of the notice of June 14, 1972, the Administrator will no longer assert that employees of contract mail carriers are not within the 13(b)(1) exemption for overtime work performed after June 14, 1972, pending authoritative court decisions to the contrary. This position is adopted without prejudice to the rights of individual employees under section 16(b) of the Fair Labor Standards Act.

(c) Section 202(c)(2) of the Motor Carrier Act, as amended on May 16, 1942, makes section 204 of that act "relative to qualifications and maximum hours of service of employees and safety of operations and equipment," applicable "to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a * * * railroad * * * express company * * * motor carrier * * * water carrier * * * or a freight forwarder * * * in the performance within terminal areas of transfer, collection, or delivery service." Thus, drivers, drivers' helpers, loaders, and mechanics of a motor carrier performing pickup and delivery service for a railroad, express company, or water carrier are to be regarded as within the 13(b)(1) exemption. (See Levinson v. Spector Motor Service, 330 U.S. 649 (footnote 10); cf. Cedarblade v. Parmelee Transp. Co. (C.A. 7), 166 F. (2d) 554, 14 Labor Cases, par. 64,340.) The same is true of drivers, drivers' helpers, loaders, and mechanics employed directly by a railroad, a water carrier or a freight forwarder in pickup and delivery service. Section 202(c)(1) of the Motor Carrier Act, as amended on May 16, 1942, includes employees employed by railroads, water carriers, and freight forwarders, in transfer, collection, and delivery service in terminal areas by motor vehicles within the Interstate Commerce Commission's regulatory power under section 204 of the same act. See Morris v. McComb, 332 U.S. 422 and § 782.2(a). (Such employees of a carrier subject to part I of the Interstate Commerce Act may come within the exemption from the overtime requirements provided by section 13(b)(2). Cf. Cedarblade v. Parmelee Transp. Co. (C.A. 7), 166 F. (2d) 554, 14 Labor Cases, par. 64,340. Thus, only employees of a railroad, water carrier, or freight forwarder outside of the scope of part I of the Interstate Commerce Act and of the 13(b)(2) exemption are affected by the above on and after the date of the amendment.) Both before and after the amendments referred to, it has been the Division's position that the 13(b)(1) exemption is applicable to drivers, drivers' helpers, loaders, and mechanics employed in pickup and delivery service to line-haul motor carrier depots or under contract with forwarding companies, since the Interstate Commerce Commission had determined that its regulatory power under section 204 of the Motor Carrier Act extended to such employees.

(d) The determinations of the Interstate Commerce Commission discussed in paragraphs (a), (b), and (c) of this section have not been amended or revoked by the Secretary of Transportation. These determinations will continue to guide the Administrator of the Wage and Hour Division in his enforcement of section 13(b)(1) of the Fair Labor Standards Act.

[36 FR 21778, Nov. 13, 1971, as amended at 37 FR 23638, Nov. 7, 1972]

PART 783—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES EMPLOYED AS SEAMEN

INTRODUCTORY

Sec.
783.0 Purpose of this part.
783.1 General scope of the Act.
783.2 Matters discussed in this part.
783.3 Significance of official interpretations.
783.4 Basic support for interpretations.
783.5 Interpretations made, continued, and superseded by this part.

SOME BASIC DEFINITIONS

783.6 Definitions of terms used in the Act.
783.7 "Employer", "employee", and "employ".
783.8 "Person".
783.9 "Enterprise".

Sec.
783.10 "Establishment".
783.11 "Enterprise engaged in commerce or in the production of goods for commerce".
783.12 "Commerce".
783.13 "Production".
783.14 "Goods".
783.15 "State".
783.16 "Wage".
783.17 "American vessel".

APPLICATION IN GENERAL OF THE ACT'S PROVISIONS

783.18 Commerce activities of employees.
783.19 Commerce activities of enterprises in which employee is employed.
783.20 Exemptions from the Act's provisions.
783.21 Guiding principles for applying coverage and exemption provisions.
783.22 Pay standards for employees subject to "old" coverage of the Act.
783.23 Pay standards for "newly covered" employees.

THE STATUTORY PROVISIONS REGARDING SEAMEN

783.24 The section 13(a)(14) exemption.
783.25 The section 13(b)(6) exemption.
783.26 The section 6(b)(2) minimum wage requirement.
783.27 Scope of the provisions regarding "seamen".

LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF THE EXEMPTIONS

783.28 General legislative history.
783.29 Adoption of the exemption in the original 1938 Act.
783.30 The 1961 Amendments.

WHO IS "EMPLOYED AS A SEAMAN"

783.31 Criteria for employment "as a seaman".
783.32 "Seaman" includes crew members.
783.33 Employment "as a seaman" depends on the work actually performed.
783.34 Employees aboard vessels who are not "seamen".
783.35 Employees serving as "watchmen" aboard vessels in port.
783.36 Barge tenders.
783.37 Enforcement policy for nonseaman's work.

WHAT IS AN "AMERICAN VESSEL"

783.38 Statutory definition of "American vessel".
783.39 "Vessel" includes all means of water transportation.
783.40 "Documented" vessel.
783.41 "Numbered" vessel.
783.42 Vessels neither "documented" nor "numbered".

COMPUTATION OF WAGES AND HOURS

Sec.
783.43 Computation of seaman's minimum wage.
783.44 Board and lodging as wages.
783.45 Deductions from wages.
783.46 Hours worked.
783.47 Off-duty periods.

APPLICATION OF THE EXEMPTIONS

783.48 Factors determining application of exemptions.
783.49 Workweek unit in applying the exemptions.
783.50 Work exempt under another section of the Act.
783.51 Seamen on a fishing vessel.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

SOURCE: 27 FR 8309, Aug. 21, 1962, unless otherwise noted.

INTRODUCTORY

§ 783.0 Purpose of this part.

This Part 783 is the official interpretation of the Department of Labor with respect to the meaning and application of sections 6(b)(2), 13(a)(14), and 13(b)(6) of the Fair Labor Standards Act, as amended, which govern the application of the minimum wage and overtime pay requirements of the Act to employees employed as seamen. Prior to the Fair Labor Standards Amendments of 1961, which became effective on September 3, 1961, all employees employed as seamen were exempt from both the minimum wage and overtime pay provisions of the Act. The 1961 amendments have narrowed this exemption so as to extend the minimum wage provisions of the Act to employees employed as seamen on American vessels. Employees employed as seamen on vessels other than American vessels continue to be exempt from both the minimum wage and the overtime pay requirements of the Act. It is the purpose of this part to make available in one place the interpretations of the law relating to employees employed as seamen which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

§ 783.1 General scope of the Act.

The Fair Labor Standards Act, as amended, is a Federal statute of general application which establishes minimum wage, overtime pay, and child labor requirements that apply as provided in the Act. All employees, whose employment has the relationship to interstate or foreign commerce which the Act specifies, are subject to the prescribed labor standards unless specifically exempt from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 783.2 Matters discussed in this part.

This Part 783 discusses the meaning and application of the exemptions provided in sections 13(a)(14) and 13(b)(6) of the Act. The provisions of section 6(b)(2) of the Act, which relate to the calculation of minimum wages and the hours worked by seamen on American vessels, are also discussed in this part. Other provisions of the Act are discussed only to make clear their relevance to these provisions and are not considered in detail in this part. Interpretations and regulations also published elsewhere in this title deal in some detail with such subjects as the general coverage of the Act (Part 776 of this chapter), methods of payment of wages (Part 531 of this chapter), hours worked (Part 785 of this chapter), recordkeeping requirements (Part 516 of this chapter), and qualifications for exempt executive, administrative, and professional employees (Part 541 of this chapter). Reference should also be made to Subpart G of Part 570 of this chapter which contains the official interpretations of the child labor provisions of the Act. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

§ 783.3 Significance of official interpretations.

This part contains the official interpretations of the Department of Labor pertaining to the provisions of section 6(b)(2) and the exemptions provided in sections 13(a)(14) and 13(b)(6) of the Act. It is intended that the positions stated concerning the Act will serve as "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift, 323 U.S. 134). The Secretary of Labor and the Administrator will follow these interpretations in the performance of their duties under the Act, unless and until they are otherwise directed by authoritative decisions of the courts or conclude upon re-examination of an interpretation that it is incorrect. The interpretations contained herein may be relied upon in accordance with section 10 of the Portal-to-Portal Act (29 U.S.C. 251-262), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

§ 783.4 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (Mitchell v. Zachry, 362 U.S. 310; Kirschbaum v. Walling, 316 U.S. 517). Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290). As included in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

§ 783.5 Interpretations made, continued, and superseded by this part.

On and after publication of this Part 783 in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as Part 783 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended by the Fair Labor Standards Amendments of 1961 are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met by employers and employees in the application of the Act. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretations or practice or enforcement policy. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

SOME BASIC DEFINITIONS

§ 783.6 Definitions of terms used in the Act.

The meaning and application of the provisions of law discussed in this part depend in large degree on the definitions of terms used in these provisions. The Act itself defines some of these terms. Others have been defined and construed in decisions of the courts. In the following sections some of these basic definitions are set forth for ready reference in connection with the part's discussion of the various provisions in which they appear. These definitions and their application are further considered in other statements of interpretations to which reference is made, and in the sections of this part where the particular provisions containing the defined terms are discussed.

§ 783.7 "Employer", "employee", and "employ".

The Act's major provisions impose certain requirements and prohibitions on every "employer" subject to their terms. The employment by an "employer" of an "employee" is, to the extent specified in the Act, made subject to minimum wage and overtime pay requirements and to prohibitions against the employment of oppressive child labor. The Act provides its own definitions of "employer", "employee", and "employ", under which "economic reality" rather than "technical concepts" determines whether there is employment subject to its terms (Goldberg v. Whitaker House Cooperative, 366 U.S. 28; United States v. Silk, 331 U.S. 704; Rutherford Food Corp. v. McComb, 331 U.S. 772). An "employer", as defined in section 3(d) of the Act, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization". An "employee", as defined in section 3(e) of the Act, "includes any individual employed by an employer", and "employ", as used in the Act, is defined in section 3(g) to include "to suffer or permit to work". It should be noted, as explained in Part 791 of this chapter, dealing with joint employment, that in appropriate circumstances two or more employers may be jointly responsible for compliance with the statutory requirements applicable to employment of a particular employee. It should also be noted that "employer", "enterprise", and "establishment" are not synonymous terms, as used in the Act. An employer may have an enterprise with more than one establishment, or he may have more than one enterprise, in which he employs employees within the meaning of the Act. Also, there may be different employers who employ employees in a particular establishment or enterprise.

§ 783.8 "Person".

As used in the Act (including definition of "enterprise" set forth below in § 783.9), "person" is defined as meaning "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons" (Act, section 3(a)).

§ 783.9 "Enterprise".

The term "enterprise" which may, in some situations, be pertinent in determining coverage of this Act of employees employed by employers on vessels, is defined in section 3(r) of the Act. Section 3(r) states:

> Enterprise means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.

The scope and application of this definition is discussed in Part 776 of this chapter and in §§ 779.200 through 779.235 of this chapter.

§ 783.10 "Establishment".

As used in the Act (including the provision quoted below in § 783.11), the term "establishment", which is not specifically defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (Phillips v. Walling, 334 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., 1st sess. p. 35). This is the meaning of the term as used in sections 3(r), 3(s), and 6(b) of the Act. An establishment may have employees employed away from the establishment as well as within it (H. Rept. No. 1453, supra).

§ 783.11 "Enterprise engaged in commerce or in the production of goods for commerce".

Portions of the definition of "enterprise engaged in commerce or in the production of goods for commerce" (Act section 3(s)) which may in some situations determine the application of provisions of the Act to employees employed by employers on vessels are as follows:

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:
>
> * * * * *
>
> (3) any establishment of any such enterprise * * * which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000.
>
> * * * * *

The application of this definition is considered in Part 776 of this chapter.

§ 783.12 "Commerce".

"Commerce" as used in the Act includes interstate and foreign commerce. It is defined in section 3(b) of the Act to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." (For the definition of "State", see § 783.15.) The application of this definition and the kinds of activities which it includes are discussed at length in Part 776 of this chapter dealing with the general coverage of the Act.

§ 783.13 "Production".

To understand the meaning of "production" of goods for commerce as used in the Act it is necessary to refer to the definition in section 3(j) of the term "produced". A detailed discussion of the application of the terms as defined is contained in Part 776 of this chapter, dealing with the general coverage of the Act. Section 3(j) provides that "produced" as used in the Act "means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." (For the definition of "State" see § 783.15.)

§ 783.14 "Goods".

The definition in section 3(i) of the Act states that "goods", as used in the Act means "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." Part 776 of this chapter, dealing with the general coverage of the Act, contains a detailed discussion of the application of this definition and what is included in it.

§ 783.15 "State".

As used in the Act, "State" means "any State of the United States or the District of Columbia or any Territory or possession of the United States" (Act, section 3(c)). The application of this definition in determining questions of coverage under the Acts' definition of "commerce" and "produced" (see §§ 783.12, 783.13) is discussed in Part 776 of this chapter, dealing with general coverage.

§ 783.16 "Wage".

"Wage" paid to an employee is defined in section 3(m) of the Act to include "the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measure of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee". Although there is some incidental discussion in this part of this definition and its impact, a fuller discussion of its meaning and the regulations pertaining thereto are set forth in Part 531 of this chapter.

§ 783.17 "American vessel".

Section 3(p) of the Act, added by the 1961 Amendments, defines "American vessel" to include "any vessel which is documented or numbered under the laws of the United States." This definition and its effect with respect to the application of the Act to employment of individuals as seamen are discussed in subsequent sections of this part.

APPLICATION IN GENERAL OF THE ACT'S PROVISIONS

§ 783.18 Commerce activities of employees.

Prior to the 1961 Amendments, the Fair Labor Standards Act applied to all employees, not specifically exempted, who are engaged (a) in interstate or foreign commerce or (b) in the production of goods for such commerce, which is defined to include any closely related process or occupation directly, essential to such production (29 U.S.C. 206(a), 207(a); and see §§ 783.12 to 783.15 for definitions governing the scope of this coverage). The Act as amended in 1961 continues this coverage. In general, employees of businesses concerned with the transportation of goods or persons on navigable waters are engaged in interstate or foreign commerce or in the production of goods for such commerce, as defined in the Act, and are subject to the Act's provisions except as otherwise provided in sections 13(a)(14) and 13(b)(6) or other express exemptions. A detailed discussion of the activities in commerce or in the production of goods for commerce which will bring an employee under the Act is contained in Part 776 of this chapter, dealing with general coverage.

§ 783.19 Commerce activities of enterprises in which employee is employed.

Under amendments to the Fair Labor Standards Act effective September 3, 1961, employees not covered by reason of their personal engagement in interstate commerce activites, as explained in § 783.18, are nevertheless brought within the coverage of the Act if they are employed in an enterprise which is defined in section 3(s) of the Act as an enterprise engaged in commerce or in the production of goods for commerce, or by an establishment described in section 3(s)(3) of the Act (see § 783.11). Such employees, if not exempt from the minimum wage and overtime pay requirements under section 13(a)(14) or exempt from the overtime pay requirements under section 13(b)(6), will have to be paid in accordance with those monetary standards of the Act unless expressly exempt under some other provision. This would generally be true of employees employed in enterprises and by establishments engaged in a business concerned with transportation of goods or persons by vessels, where the enterprise has an annual gross sales volume of $1,000,000 or more. Enterprise coverage is more fully discussed in Part 776 of this chapter, dealing with general coverage.

§ 783.20 Exemptions from the Act's provisions.

The Act provides a number of specific exemptions from the general requirements previously described. Some are exemptions from the overtime provisions only. Others are from the child labor provisions only. Several are exemptions from both the minimum wage and the overtime requirements of the Act. Finally, there are some exemptions from all three—minimum wage, overtime pay, and child labor requirements. An examination of the terminology in which the exemptions from the general coverage of the Fair Labor Standards Act are stated discloses language patterns which reflect congressional intent. Thus, Congress specified in varying degree the criteria for application of each of the exemptions and in a number of instances differentiated as to whether employees are to be exempt because they are employed by a particular kind of employer, employed in a particular type of establishment, employed in a particular industry, employed in a particular capacity or occupation, or engaged in a specified operation. (See 29 U.S.C. 203(d); 207 (b), (c), (h); 213 (a), (b), (c), (d). And see Addison v. Holly Hill, 322 U.S. 607; Walling v. Haden, 153 F. 2d 196, certiorari denied 328 U.S. 866; Mitchell v. Stinson, 217 F. 2d 210.) In general, there are no exemptions from the child labor requirements that apply in enterprises or establishments engaged in transportation or shipping (see Part 570, Subpart G of this chapter). Such enterprises or establishments will, however, be concerned with the exemption from overtime pay in section 13(b)(6) of the Act for employees employed as seamen and the exemption from the mimimum wage and overtime pay requirements provided by section 13(a)(14) for employees so employed on vessels other than American vessels. These exemptions, which are subject to the general rules stated in § 783.21, are discussed at length in this part.

§ 783.21 Guiding principles for applying coverage and exemption provisions.

It is clear that Congress intended the Fair Labor Standards Act to be broad in its scope (Helena Glendale Ferry Co. v. Walling, 132 F. 2d 616). "Breadth of coverage is vital to its mission" (Powell v. U.S. Cartridge Co., 339 U.S. 497). An employer who claims an exemption under the Act has the burden of showing that it applies (Walling v. General Industries Co., 330 U.S. 545; Mitchell v. Kentucky Finance Co., 359 U.S. 290; Tobin v. Blue Channel Corp., 198 F. 2d 245, approved in Mitchell v. Myrtle Grove Packing Co., 350 U.S. 891; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52). Conditions specified in the language of the Act are "explicit prerequisites to exemption" (Arnold v. Kanowsky, 361 U.S. 388; and see Walling v. Haden, 153 F. 2d 196). In their application, the purpose of the exemption as shown in its legislative history as well as its language should be given effect. However, "the details with which the exemptions in this Act have been made preclude their enlargement by implication" and "no matter how broad the exemption, it is meant to apply only to" the specified activities (Addison v. Holly Hill, 322 U.S. 607; Maneja v. Waialua, 349 U.S. 254). Exemptions provided in the Act "are to be narrowly construed against the employer seeking to assert them" and their application limited to those who come "plainly and unmistakably within their terms and spirits." This construction of the exemptions is necessary to carry out the broad objectives for which the Act was passed (Phillips v. Walling, 324 U.S. 490; Mitchell v. Kentucky Finance Co., supra; Arnold v. Kanowsky, supra; Helena Glendale Ferry Co. v. Walling, supra; Mitchell v. Stinson, 217 F. 2d 210; Flemming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Walling v. Bay State Dredging & Contracting Co., 149 F. 2d 346, certiorari denied 326 U.S. 760; Anderson v. Manhattan Lighterage Corp., 148 F. 2d 971, certiorari denied 326 U.S. 722; Sternberg Dredging Co. v. Walling, 158 F. 2d 678).

§ 783.22 Pay standards for employees subject to "old" coverage of the Act.

The 1961 amendments did not change the tests described in § 783.18 by which coverage based on the employee's individual activities is determined. Any employee whose employment satisfies these tests and would not have come within some exemption (such as section 13(a)(14)) in the Act prior to the 1961 amendments is subject to the "old" provisions of the law and entitled to a minimum wage of at least $1.15 an hour beginning September 3, 1961, and not less than $1.25 an hour beginning September 3, 1963 (29 U.S.C. 206(a)(1)), unless expressly exempted by some provision of the amended Act. Such an employee is also entitled to overtime pay for hours worked in excess of 40 in any workweek at a rate not less than one and one-half times his regular rate of pay (29 U.S.C. 207(a)(1)), unless expressly exempt from overtime by some exemption such as section 13(b)(6). (Minimum wage rates in Puerto Rico, the Virgin Islands, and American Samoa are governed by special provisions of the Act (26 U.S.C. 206(a)(3); 206(c)(2).) Information on these rates is available at any office of the Wage and Hour Division.

§ 783.23 Pay standards for "newly covered" employees.

There are some employees whose individual activities would not bring them within the minimum wage or overtime pay provisions of the Act as it was prior to the 1961 amendments, but who are brought within minimum wage or overtime coverage or both for the first time by the new "enterprise" coverage provisions or changes in exemptions, or both, which were enacted as part of the amendments and made effective September 3, 1961. Typical of such employees are those who, regardless of any engagement in commerce or in the production of goods for commerce, are employed as seamen and would therefore have been exempt from minimum wage as well as overtime pay requirements by virtue of section 13(a)(14) of the Act until the 1961 amendments if so employed during that period, but who by virtue of these amendments are exempt only from the overtime pay requirements on and after September 3, 1961, under section 13(b)(6) of the amended Act. These "newly covered" employees for whom no specific exemption has been retained or provided in the amendments must be paid not less than the minimum wages shown in the schedule below for hours worked, computed, in the case of employees employed as seamen, in accordance with the special provisions of section 6(b)(2) which are discussed in subsequent sections of this part. Any "newly covered" employees who are not exempted by section 13(b)(6) because of their employment as seamen must be paid, unless exempted by some other provision, not less than one and one-half times their regular rates of pay for overtime, as shown in the schedule below.

Beginning	Minimum wage (29 U.S.C. 206(b))	Overtime pay (29 U.S.C. 207(a)(2))
Sept. 3, 1961	$1 an hour	None required.
Sept. 3, 1963	No change	After 44 hours in a workweek
Sept. 3, 1964	$1.15 an hour	After 42 hours in a workweek.
Sept. 3, 1965 [1] and thereafter.	$1.25 an hour	After 40 hours in a workweek.

[1] Requirements identical to those for employees under "old" coverage. (Minimum wage rates for newly covered employees, in Puerto Rico, the Virgin Islands, and American Samoa are set by wage order on recommendations of special industry committees (29 U.S.C. 206(a)(3); 206(c)(2). Information on these rates may be obtained at any office of the Wage and Hour and Public Contracts Divisions.)

THE STATUTORY PROVISIONS REGARDING SEAMEN

§ 783.24 The section 13(a)(14) exemption.

Section 13(a)(14) of the Fair Labor Standards Act exempts from the minimum wage and overtime pay requirements of the Act, but not from its child labor provisions, "any employee employed as a seaman on a vessel other than an American vessel".

§ 783.25 The section 13(b)(6) exemption.

Section 13(b)(6) of the Act exempts from the overtime pay requirements of the Act, but not from its other requirements, "any employee employed as a seaman".

§ 783.26 The section 6(b)(2) minimum wage requirement.

Section 6(b), with paragraph (2) thereof, requires the employer to pay to an employee, "if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement)." The "hourly rate prescribed by" paragraph (1) of the subsection is the minimum wage rate applicable according to the schedule shown in § 783.23.

§ 783.27 Scope of the provisions regarding "seamen".

In accordance with the above provisions of the Act as amended, an employee employed as a seaman is exempt only from its overtime pay provisions under the new section 13(b)(6), unless the vessel on which he is employed is not an American vessel. Section 13(a)(14) as amended continues the prior exemption, from minimum wages as well as overtime pay, for any employees employed as a seaman on a vessel other than an American vessel. Thus, to come within this latter exemption an employee now must be "employed as" a "seaman" on a vessel other than an "American vessel", while to come within the overtime exemption provided by section 13(b)(6) an employee need only be "employed as" a "seaman". The minimum wage requirements of the Act, as provided in section 6(b) and paragraph (2) of that subsection apply if the employee is "employed as" a "seaman" on an "American vessel". The meaning and scope of these key words, "employed as a seaman" and "American vessel" are discussed in subsequent sections of this part. Of course, if an employee is not "employed as" a "seaman" within the meaning of this term as used in the Act, these exemptions and section 6(b)(2) would have no relevancy and his status under the Act would depend, as in the case of any other employee, upon the other facts of his employment, (§§ 783.18 through 783.20.)

LEGISLATIVE HISTORY AND JUDICIAL CONSTRUCTION OF THE EXEMPTIONS

§ 783.28 General legislative history.

As originally enacted in 1938, section 13(a)(3) of the Fair Labor Standards Act exempted from both the minimum wage and overtime pay requirements "any employee employed as a seaman" (52 Stat. 1050). In 1949 when several amendments were made to the Act (63 Stat. 910), this exemption was not changed except that it was renumbered section 13(a)(14). In the 1961 amendments (75 Stat. 65), a like exemption was retained but it was limited to one employed as a seaman on a vessel other than an American vessel (sec. 13(a)(14)); an overtime exemption was provided for all employees employed as seamen (sec. 13(b)(6)), and those employed as seamen on an American vessel were brought within the minimum wage provisions (sec. 6(b)(2)).

§ 783.29 Adoption of the exemption in the original 1938 Act.

(a) The general pattern of the legislative history of the Act shows that Congress intended to exempt, as employees "employed as" seamen, only workers performing water transportation services. The original bill considered by the congressional committees contained no exemption for seamen or other transportation workers. At the joint hearings before the Senate and House Committees on Labor, representatives of the principal labor organizations representing seamen and other transportation workers testified orally and by writing that the peculiar needs of their industry and the fact that they were already under special governmental regulation made it unwise to bring them within the scope of the proposed legislation (see Joint Hearings before Senate Committee on Education and Labor and House Committee on Labor on S. 2475 and H.R. 7200, 75tn Cong., 1st sess., pp. 545, 546, 547, 549, 1216, 1217). The committees evidently acquiesced in this view and amendments were accepted (81 Cong. Rec. 7875) and subsequently adopted in the law, exempting employees employed as seamen (sec. 13(a)(3)), certain employees of motor carriers (sec. 13(b)(1)), railroad employees (sec. 13(b)(2)), and employees of carriers by air (sec. 13(a)(4), now sec. 13(b)(3)).

(b) That the exemption was intended to exempt employees employed as "seamen" in the ordinary meaning of that word is evidenced by the fact that the chief proponents for the seamen's exemption were the Sailors Union of the Pacific and the National Maritime Union. The former wrote asking for an exemption for "seamen" for the reason that they were already under the jurisdiction of the Maritime Commission pursuant to the Merchant Marine Act of 1936 (Joint Hearings before the Committees on Labor on S. 2475 and H.R. 7200, 75th Cong., 1st sess., pp. 1216, 1217). The representative of the latter union also asked that "seamen" be exempted for the same reason saying * * * "We feel that in a general interpretation of the whole bill that the way has been left open for the proposed Labor Standards Board to have jurisdiction over those classes of workers who are engaged in transportation. While this may not have an unfavorable effect upon the workers engaged in transportation by water, we feel that it may conflict with the laws now in effect regarding the jurisdiction of the government machinery now set up to handle these problems" (id. at p. 545). And he went on to testify, "What we would like is an interpretation of the bill which would provide a protective clause for the 'seamen' " (id. at p. 547).

(c) Consonant with this legislative history, the courts in interpreting the phrase "employee employed as a seaman" for the purpose of the Act have given it its commonly accepted meaning, namely, one who is aboard a vessel necessarily and primarily in aid of its navigation (Walling v. Bay State Dredging and Contracting Co., 149 F. 2d 346; Walling v. Haden, 153 F. 2d 196; Sternberg Dredging Co. v. Walling, 158 F. 2d 678). In arriving at this conclusion the courts recognized that the term "seaman" does not have a fixed and precise meaning but that its meaning is governed by the context in which it is used and the purpose of the statute in which it is found. In construing the Fair Labor Standards Act, as a remedial statute passed for the benefit of all workers engaged in commerce, unless exempted, the courts concluded that giving a liberal interpretation of the meaning of the term "seaman" as used in an exemptive provision of the Act would frustrate rather than accomplish the legislative purpose (Helena Glendale Ferry Co. v. Walling, 132 F. 2d 616; Walling v. Bay State Dredging and Contracting Co., supra; Sternberg Dredging Co. v. Walling, supra; Walling v. Haden, supra).

§ 783.30 The 1961 Amendments.

One of the steps Congress took in the 1961 Amendments to extend the monetary provisions of the Act to more workers was to limit the scope of the exemption which excluded all employees employed as seamen from application of the minimum wage and overtime provisions. This it did by extending the minimum wage provisions of the Act to one employed as a seaman on an American vessel (section 6(b)(2)), by adding to the language of section 13(a)(14) to make the exemption applicable only to a seaman employed on a vessel other than an American vessel, and finally by the addition of a new exemption, section 13(b)(6), relieving employers of overtime pay requirements with respect to those employees employed as seamen who do not come within the scope of the amended section 13(a)(14). (H. Rep. No. 75, 87th Cong., 1st sess., pp. 33, 36; Sen. Rep. No. 145, 87th Cong., 1st sess., pp. 32, 50; Statement of the Managers on the Part of the House, H. (Cong.) Rep. No. 327, 87th Cong., 1st sess., p. 16.) In view of the retention in the 1961 amendments of the basic language of the original exemption, "employee employed as a seaman", the legislative history and prior judicial construction (see § 783.29) of the scope and meaning of this phrase would seem controlling for purposes of the amended Act.

WHO IS "EMPLOYED AS A SEAMAN"

§ 783.31 Criteria for employment "as a seaman."

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels (Sternberg Dredging Co. v. Walling, 158 F. 2d 678; Walling v. Haden, 153 F. 2d 196, certiorari denied 328 U.S. 866; Walling v. Great Lakes Dredge & Dock Co., 149 F. 2d 9, certiorari denied 327 U.S. 722; Douglas v. Dixie Sand and Gravel Co., (E.D. Tenn.) 9 WH Cases 285). The Act's provisions with respect to seamen apply to a seaman only when he is "employed as" such (Walling v. Haden, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

§ 783.32 "Seaman" includes crew members.

The term "seaman" includes members of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 783.31. In some cases it may not be of that type, in which event the special provisions relating to seamen will not be applicable

(Sternberg Dredging Co. v. Walling, 158 F. 2d 678; Cuascut v. Standard Dredging Co., 94 F. Supp. 197; Woods Lumber Co. v. Tobin, 199 F. 2d 455). However, an employee employed as a seaman does not lose his status as such simply because, as an incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the beginning or end of a voyage, if the amount of such work is not substantial.

§ 783.33 Employment "as a seaman" depends on the work actually performed.

Whether an employee is "employed as a seaman", within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed (Walling v. Haden, 153 F. 2d 196; Cuascut v. Standard Dredging Corp., 94 F. Supp. 197). Merely because one works aboard a vessel (Helena Glendale Ferry Co. v. Walling, 132 F. 2d 616; Walling v. Bay State Dredging & Contracting Co., 149 F. 2d 346), or may be articled as a seaman (see Walling v. Haden, supra), or performs some maritime duties (Walling v. Bay State Dredging & Contracting Co., 149 F. 2d 346; Anderson v. Manhattan Lighterage Corp., 148 F. 2d 971) one is not employed as a seaman within the meaning of the Act unless one's services are rendered primarily as an aid in the operation of the vessel as a means of transportation, as for example services performed substantially as an aid to the vessel in navigation. For this reason it would appear that employees making repairs to vessels between navigation seasons would not be "employed as" seamen during such a period. (See Desper v. Starved Rock Ferry Co., 342 U.S. 187; but see Walling v. Keansburg Steamboat Co., 162 F. 2d 405 in which the seaman exemption was allowed in the case of an article employee provided he also worked in the ensuing navigation period but not in the case of unarticled employees who only worked during the lay-up period.) For the same and other reasons, stevedores and longshoremen are not employed as seamen. (Knudson v. Lee & Simmons, Inc., 163 F. 2d 95.) Stevedores or roust-abouts traveling aboard a vessel from port to port whose principal duties require them to load and unload the vessel in port would not be employed as seamen even though during the voyage they may perform from time to time certain services of the same type as those rendered by other employees who would be regarded as seamen under the Act.

§ 783.34 Employees aboard vessels who are not "seamen".

Concessionaires and their employees aboard a vessel ordinarily do not perform their services subject to the authority, direction, and control of the master of the vessel, except incidentally, and their services are ordinarily not rendered primarily as an aid in the operation of the vessel as a means of transportation. As a rule, therefore, they are not employed as seamen for purposes of the Act. Also, other employees working aboard vessels, whose service is not rendered primarily as an aid to the operation of the vessel as a means of transportation are not employed as seamen (Knudson v. Lee & Simmons, Inc., 163 F. 2d 95; Walling v. Haden, 153 F. 2d 196, certiorari denied 32 U.S. 866). Thus, employees on floating equipment who are engaged in the construction of docks, levees, revetments or other structures, and employees engaged in dredging operations or in the digging or processing of sand, gravel, or other materials are not employed as seamen within the meaning of the Act but are engaged in performing essentially industrial or excavation work (Sternberg Dredging Co. v. Walling, 158 F. 2d 678; Walling v. Haden, supra; Walling v. Bay State Dredging & Contracting Co., 149 F. 2d 346; Walling v. Great Lakes Dredge & Dock Co., 149 F. 2d 9, certiorari denied 327 U.S. 722). Thus, "captains" and "deck hands" of launches whose dominant work was industrial activity performed as an integrated part of harbor dredging operations and not in furtherance of transportation have been held not to be employed as seamen within the meaning of the Act (Cuascut v. Standard Dredging Corp. 94 F. Supp. 197).

§ 783.35 Employees serving as "watchmen" aboard vessels in port.

Various situations are presented with respect to employees rendering watchman or similar service aboard a vessel in port. Members of the crew, who render such services during a temporary stay in port or during a brief lay-up for minor repairs, are still employed as "seamen". Where the vessel is laid up for a considerable period, members of the crew rendering watchman or similar services aboard the vessel during this period would not appear to be within the special provisions relating to seamen because their services are not rendered primarily as an aid in the operation of the vessel as a means of transportation. See Desper v. Starved Rock Ferry Co., 342 U.S. 187. Furthermore, employees who are furnished by independent contractors to perform watchman or similar services aboard a vessel while in port would not be employed as seamen regardless of the period of time the vessel is in port, since such service is not of the type described in § 783.31. The same considerations would apply in the case of members of a temporary or skeleton crew hired merely to maintain the vessel while in port so that the regular crew may be granted shore leave. On the other hand, licensed relief officers engaged during relatively short stays in port whose duty it is to maintain the ship in safe and operational condition and who exercise the authority of the master in his absence, including keeping the log, checking the navigation equipment, assisting in the movement of the vessel while in port, are employed as seamen within the meaning of the exemptions. The same may be true of licensed relief engineers employed under the same circumstances whose duty it is to maintain the ship's auxiliary machinery in operation and repair (see Pratt v. Alaska Packers Asso. (N.D. Calif.) 9 WH Cases 61).

§ 783.36 Barge tenders.

Barge tenders on non-selfpropelled barges who perform the normal duties of their occupation, such as attending to the lines and anchors, putting out running and mooring lights, pumping out bilge water, and other similar activities necessary and usual to the navigation of barges, are considered to be employed as "seamen" for the purposes of the Act unless they do a substantial amount of "non-seaman's" work (Gale v. Union Bag & Paper Corp., 116 F. (2d) 27 (C.A. 5, 1940), cert. den. 313 U.S. 559 (1941)). However, there are employees who, while employed on vessels such as barges and lighters, are primarily or substantially engaged in performing duties such as loading and unloading or custodial service which do not constitute service performed primarily as an aid in the operation of these vessels as a means of transportation and consequently are not employed as "seamen" (McCarthy v. Wright & Cobb Lighterage Co., 163 F. (2d) 92; Anderson v. Manhattan Lighterage Corp., 148 F. (2d) 971, certiorari denied 326 U.S. 722; Woods Lumber Co. v. Tobin, 20 Labor Cases 66, 640 (W.D. Tenn, 1951), aff'd, 199 F. (2d) 455). Whether an employee is on board a vessel primarily to perform maritime services as a seaman or loading and unloading services typical of such shore-bases personnel as longshoremen is a question of fact and can be determined only after reviewing all the facts in the particular case.

§ 783.37 Enforcement policy for non-seaman's work.

In the enforcement of the Act, an employee will be regarded as "employed as a seaman" if his work as a whole meets the test stated in § 783.31, even though during the workweek he performs some work of a nature other than that which characterizes the service of a seaman, if such nonseaman's work is not substantial in amount. For enforcement purposes, the Administrator's position is that such differing work is "substantial" if it occupies more than 20 percent of the time worked by the employee during the workweek.

WHAT IS AN "AMERICAN VESSEL"

§ 783.38 Statutory definition of "American vessel".

The provisions of section 6(b)(2) prescribe special methods for computing minimum wages and hours worked under the Act which are applicable only to seamen who are employed on American vessels. An "American vessel", which would appear to signify a vessel of the United States as distinguished from a foreign vessel, "includes", under the terms of the definition in section 3(p) of the Act, "any vessel which is documented or numbered under the laws of the United States." The Department of the Treasury, Bureau of Customs and the United States Coast Guard, respectively, are responsible for documentation and numbering of vessels.

§ 783.39 "Vessel" includes all means of water transportation.

Since the Act does not define "vessel" it is appropriate to apply the difinition of "vessel" as set forth in the United States Code (1 U.S.C. 3). The Code defines "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water". But the Federal Boating Act of 1958, (under which the U.S. Coast Guard is responsible for numbering vessels) and the Documentation Regulations administered by the Bureau of Customs, utilize this basic definition, with the addition of specific exclusions for "seaplanes" and "aircraft" (46 U.S.C. 527; 19 CFR 3.1(a)).

§ 783.40 "Documented" vessel.

A vessel "documented * * * under the laws of the United States" is typically a vessel which has been registered, enrolled and licensed, or licensed by the Bureau of Customs under the laws of the United States (46 U.S.C. 11, 193, 251-252, 258, 840). Although Bureau of Customs regulations provide for three types of documentations, distinctions between the categories of vessels subject to them are immaterial for the purposes of the Fair Labor Standards Act, since a vessel with any of the three kinds of documentation is an "American vessel" within the section 3(p) definition. Generally, any vessel of five net tons or more which is owned by a citizen of the United States is "entitled to" documentation. Complete information on the documentation requirements may be found in 19 CFR Part 3.

§ 783.41 "Numbered" vessel.

A vessel "numbered under the laws of the United States" means a vessel numbered pursuant to the provisions of Federal law, including vessels numbered under any State numbering system approved by the Secretary of the Department under which the U.S. Coast Guard is operating, in accordance with section 2(c) of the Federal Boating Act of 1958 (46 U.S.C. 527-527h). Generally, any vessel, which is not required to have and does not have, a valid marine document issued by the Bureau of Customs and is propelled by machinery of more than 10 horsepower, whether or not such machinery is the principal source of propulsion, is required to be numbered in conformity with the Federal Boating Act of 1958 if it uses the navigable waters of the United States, its Territories, or the District of Columbia, or is owned in a State and uses the high seas (46 U.S.C. 527(a)). The requirements and procedures of this Act are explained in detail in 46 CFR Part 170.

§ 783.42 Vessels neither "documented" nor "numbered".

An "American vessel" on which employment as a seaman is subject to the minimum wage under the provisions of section 6(b)(2) and section 13(a)(14) is not limited by the language of the Act to those vessels which are "documented" or "numbered" as described above in §§ 783.40 and 783.41. Since the term "American vessel" has traditionally been applied to regularly documented vessels (see U.S. v. Rogers, 27 Fed. Cas. 890; Badger v. Entierrez, 111 U.S. 734; 18 Op. A.G. 234 (1885); 48 Am. Jur. 40), the inclusion of numbered vessels in the statutory definition of "American vessel" would indicate that the work "includes" is used in the sense of "embracing", as an enlargement and not as a word of limitation. The term may therefore apply to other vessels that do not fall within the illustrations given. For example, neither the documenting laws nor the numbering laws apply to vessels plying the purely internal waters of a State which do not join up with navigable waters touching on another State (19 CFR 3.5(a)(4); 33 CFR 2.10-5), but, nevertheless, the Fair Labor Standards Act does apply in those areas and it clearly would not comport with the remedial purpose of the Act to exclude from its minimum wage provisions seamen engaged in commerce or in the production of goods for commerce in those areas though the vessels are not documented or numbered. On the contrary, the legislative history shows the affirmative purpose to improve, though to a limited extent, the status of seamen (Sen. Rep. No. 145, 87th Cong., 1st sess., p. 32, 50).

COMPUTATION OF WAGES AND HOURS

§ 783.43 Computation of seaman's minimum wage.

Section 6(b) requires, under paragraph (2) of the subsection, that an employee employed as a seaman on an American vessel be paid wages at not less than the rate which will provide to the employee, for the period covered by the wage payment, wages which are equal to compensation for all hours on duty in such period at the hourly rate prescribed for employees newly covered by the Act's minimum wage requirements by reason of the 1961 Amendments (see §§ 783.23 and 783.26). Although the Act takes the workweek as the unit of time to be used in determining compliance with the minimum wage of overtime requirements and in applying the exemptions, Congress, in recognition of the unique working conditions of seamen and of the customs in the industry, made this special provision. Under section 6(b)(2) periods other than a workweek may be used, in accordance with established customs in the industry, as the basis for calculating wages for covered seamen provided the wages equal the compensation at the applicable minimum hourly rate which would be due to the employee for his hours actually spent on duty in the period. This would mean that the wage period may properly cover, for example, the period of a month or of a voyage so long as the seaman receives at the appropriate time compensation at least equal to the prescribed minimum rate for each compensable hour in that pay period. (See also § 531.26 of this chapter concerning requirements of other laws governing calculation of wages and frequency and manner of payment.) To illustrate, where seamen have customarily been paid monthly under an arrangement to perform seamen's duties during stipulated periods and to be off duty during stipulated periods during the month, if such a seaman works 300 hours during the month and receives his monthly compensation in an amount equal to a payment for that number of hours at the applicable minimum rate, there would be compliance with the requirements of section 6(b)(2). The fact that this seaman works a varying number of hours during the weeks comprising the monthly period or that the monthly compensation is disbursed in two or four partial payments to the seaman during the month would not warrant a contrary conclusion.

§ 783.44 Board and lodging as wages.

The wages for the period covered by the wage payment include all remuneration for employment paid to or on behalf of the employee for all hours actually on duty intended to be compensated by such wage payment. The reasonable cost or fair value, as determined by the Secretary of Labor pursuant to section 3(m) of the Act, of board and lodging furnished the employee during such period, if customarily furnished by the employer to his employees, is also included as part of the wages for the actual hours worked in the period (see § 783.16). However, the cost of board and lodging would not be included as part of the wages paid to the employee to the extent it is excluded from the employee's wages under terms of a bona fide collective bargaining agreement applicable to such employee, whether or not customarily furnished to the employee. Where such an exclusion is not provided for in any bona fide collective bargaining agreement applicable to the employee, the reasonable cost or fair value thereof, whichever is appropriate, as determined in accordance with the standards set forth in the regulations in Part 531 of this chapter, is included as part of the wage paid to such employee. Part 531 of this chapter also contains the official regulations and interpretations of the Department of Labor concerning the application of section 3(m) to other facilities as well as board and lodging furnished to an employee.

§ 783.45 Deductions from wages.

Where deductions are made from the wages of a seaman subject to section 6(b) of the Act, consideration must be given as to whether or not such deductions are permitted to be made when they result in the seaman receiving cash wages which are less than the applicable minimum wage rate for each hour actually on duty during the period covered by the wage payments. Such considerations are to be based upon the principles and interpretations governing such deductions. These are set forth and discussed in Part 531 of this chapter. The methods of paying the compensation required by section 6 and the application thereto of the provisions of section 3(m) of the Act, which are set forth and explained in the said Part 531, are applicable to seamen subject to the minimum wage provisions of the Act.

§ 783.46 Hours worked.

The provisions of section 6(b)(2) of the Act require that a seaman employed on an American vessel be paid wages equal to compensation at not less than the prescribed minimum wage rate for all of the hours the employee "was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement)". The Act in this portion of section 6(b)(2) is reflecting concepts that are well established in the law, and existing precedents (in such cases as Armour & Co. v. Wantock, 323 U.S. 126; Skidmore v. Swift & Co., 323 U.S. 134; Steiner v. Mitchell, 350 U.S. 247; Mitchell v. King Packing Co., 350 U.S. 260; Tennessee Coal, Iron & R. Co. v. Muscoda Local N. 123, 321 U.S. 590; and General Electric Co. v. Porter, 208 F. 2d 805, certiorari denied, 347 U.S. 951, 975) would be applicable in determining what time constitutes hours worked. See also the general discussion of hours worked in Part 785 of this chapter.

§ 783.47 Off-duty periods.

Off-duty periods include not only such periods as shore leave but also generally those hours spent by a seaman on the vessel outside his watch or normal or regular working hours and his standby periods during which hours he is not required to perform and does not perform work of any kind but is free to utilize his time for his own purpose. The fact that during such off-duty periods the employee is subject to call in case of emergency situations affecting the safety and welfare of the vessel upon which he is employed, or of its passengers, crew, or cargo or for participation in life boat or fire drills will not render such off-duty periods, excluded by employment agreement applicable to the employee, "hours worked". Responding to such calls, however, as well as the performance of work in response thereto constitute compensable work time. For further and more detailed discussion on what generally are regarded as "hours worked" under the Act, see Part 785 of this chapter.

APPLICATION OF THE EXEMPTIONS

§ 783.48 Factors determining application of exemptions.

The application of the exemptions provided by section 13(a)(14) and section 13(b)(6) of the Act is determined in accordance with their language and scope as explained in §§ 783.24, 783.25, and 783.27, with regard to the principles set forth in § 783.20 and the legislative history and judicial construction outlined in §§ 783.28 through 783.30. Whether a particular employee is exempt depends on what he does, as explained in §§ 783.31 through 783.37. Whether he is exempt from the overtime pay provisions only or from minimum wages as well depends on whether his employment is or is not on an American vessel, which is determined as indicated in §§ 783.38 through 783.42. In addition, sections 13(a)(14) and 13(b)(6), like other exemptions in the Act, apply on a workweek basis as mentioned in § 783.43 and explained in §§ 783.49 and 783.50.

§ 783.49 Workweek unit in applying the exemptions.

The unit of time to be used in determining the application of the exemption provided by section 13(b)(6) or 13(a)(14) to an employee is the workweek. (See Overnight Transportation Co. v. Missel, 316 U.S. 572; Sternberg Dredging Co. v. Walling, 158 F. 2d 678.) This is the period used in determining whether a substantial amount of non-seaman's work has been performed so as to make the exemption inapplicable. See § 783.37. A workweek is a fixed and regularly recurring interval of 7 consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing of the workweek for the purpose of escaping the requirements of the Act is not permitted.

§ 783.50 Work exempt under another section of the Act.

Where an employee performs work during his workweek, some of which is exempt under one section of the Act, and the remainder of which is exempt under another section or sections of the Act, the exemptions may be combined. The employee's combination exemption is controlled in such case by that exemption which is narrower in scope. For example, if part of his work is exempt from both minimum wage and overtime compensation under one section of the Act, and the rest is exempt only from the overtime pay requirements under section 13(b)(6), the employee is exempt that week from the overtime pay provisions but not from the minimum wage requirements.

§ 783.51 Seamen on a fishing vessel.

In extending the minimum wage to seamen on American vessels by limiting the exemption from minimum wages and overtime provided by section 13(a)(14) of the Act to "any employee employed as a seaman on a vessel other than an American vessel," and at the same time extending the minimum wage to "onshore" but not "offshore" operations concerned with aquatic products, the Congress, in the 1961 Amendments to the Act, did not indicate any intent to remove the crews of fishing vessels engaged in operations named in section 13(a)(5) from the exemption provided by that section. The exemption provided by section 13(a)(14), and the general exemption in section 13(b)(6) from overtime for "any employee employed as a seaman" (whether or not on an American vessel) apply, in general, to employees, working aboard vessels, whose services are rendered primarily as an aid to navigation (§§ 783.31-783.37). It appears, however, that it is not the custom or practice in the fishing industry for a fishing vessel to have two crews; namely, a fishing crew whose duty it is primarily to fish and to perform other duties incidental thereto and a navigational crew whose duty it is primarily to operate the boat. Where, as is the typical situation, there is but one crew which performs all these functions, the section 13(a)(5) exemption from both the minimum wage and the overtime provisions would apply to its members. For a further explanation of the fishery exemption see Part 784 of this chapter.

PART 784—PROVISIONS OF THE FAIR LABOR STANDARDS ACT APPLICABLE TO FISHING AND OPERATIONS ON AQUATIC PRODUCTS

Subpart A—General

INTRODUCTORY

Sec.
784.0 Purpose.
784.1 General scope of the Act.
784.2 Matters discussed in this part.
784.3 Matters discussed in other interpretations.
784.4 Significance of official interpretations.
784.5 Basic support for interpretations.
784.6 Interpretations made, continued, and superseded by this part.

SOME BASIC DEFINITIONS

784.7 Definition of terms used in the Act.
784.8 "Employer," "employee," and "employ."

Sec.

784.9 "Person."
784.10 "Enterprise."
784.11 "Establishment."
784.12 "Commerce."
784.13 "Production."
784.14 "Goods."
784.15 "State."
784.16 "Regular rate."

APPLICATION OF COVERAGE AND EXEMPTIONS PROVISIONS OF THE ACT

784.17 Basic coverage in general.
784.18 Commerce activities of employees.
784.19 Commerce activities of enterprise in which employee is employed.
784.20 Exemptions from the Act's provisions.
784.21 Guiding principles for applying coverage and exemption provisions.

Subpart B—Exemptions Provisions Relating to Fishing and Aquatic Products

THE STATUTORY PROVISIONS

784.100 The section 13(a)(5) exemption.
784.101 The section 13(b)(4) exemption.

LEGISLATIVE HISTORY OF EXEMPTIONS

784.102 General legislative history.
784.103 Adoption of the exemption in the original 1938 Act.
784.104 The 1949 amendments.
784.105 The 1961 amendments.

PRINCIPLES APPLICABLE TO THE TWO EXEMPTIONS

784.106 Relationship of employee's work to the named operations.
784.107 Relationship of employee's work to operations on the specified aquatic products.
784.108 Operations not included in named operations on forms of aquatic "life."
784.109 Manufacture of supplies for named operations is not exempt.
784.110 Performing operations both on nonaquatic products and named aquatic products.
784.111 Operations on named products with substantial amounts of other ingredients are not exempt.
784.112 Substantial amounts of nonaquatic products; enforcement policy.
784.113 Work related to named operations performed in off- or dead-season.
784.114 Application of exemptions on a workweek basis.
784.115 Exempt and noncovered work performed during the workweek.
784.116 Exempt and nonexempt work in the same workweek.
784.117 Combinations of exempt work.

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(a)(5) Exemption

Sec.

784.118 The exemption is intended for work affected by natural factors.
784.119 Effect of natural factors on named operations.
784.120 Application of exemption to "offshore" activities in general.
784.121 Exempt fisheries operations.
784.122 Operations performed as an integrated part of fishing.
784.123 Operations performed on fishing equipment.
784.124 Going to and returning from work.
784.125 Loading and unloading.
784.126 Operation of the fishing vessel.
784.127 Office and clerical employees under section 13(a)(5).

FIRST PROCESSING, CANNING, OR PACKING OF MARINE PRODUCTS UNDER SECTION 13(a)(5)

784.128 Requirements for exemption of first processing, etc., at sea.
784.129 "Marine products."
784.130 "At sea."
784.131 "As an incident to, or in conjuction with," fishing operations.
784.132 The exempt operations.
784.133 "First processing."
784.134 "Canning."
784.135 "Packing."

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(b)(4) EXEMPTION

784.136 "Shore" activities exempted under section 13(b)(4).
784.137 Relationship of exemption to exemption for "offshore" activities.
784.138 Perishable state of the aquatic product as affecting exemption.
784.139 Scope of exempt operations in general.
784.140 Fabrication and handling of supplies for use in named operations.
784.141 Examples of nonexempt employees.

"CANNING"

784.142 Meaning and scope of "canning" as used in section 13(b)(4).
784.143 "Necessary preparatory operations."
784.144 Preliminary processing by the canner.
784.145 Preliminary processing by another employer as part of "canning."
784.146 "Subsequent operations."
784.147 Employees "employed in" canning.

PROCESSING, FREEZING, AND CURING

784.148 General scope of processing, freezing, and curing activities.

BEST DOCUMENT AVAILABLE

Sec.
784.149 Typical operations that may qualify for exemption.
784.150 Named operations performed on previously processed aquatic products.
784.151 Operations performed after product is rendered nonperishable.
784.152 Operations performed on by-products.

MARKETING, STORING, PACKING FOR SHIPMENT, AND DISTRIBUTING

784.153 General scope of named operations.
784.154 Relationship to other operations as affecting exemption.
784.155 Activities performed in wholesale establishments.

APPLICATION OF SECTION 13(b)(4) IN CERTAIN ESTABLISHMENTS

784.156 Establishments exclusively devoted to named operations.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended, 75 Stat. 65; 29 U.S.C. 201-219.

SOURCE: 35 FR 13342, Aug. 20, 1970, unless otherwise noted.

Subpart A—General

INTRODUCTORY

§ 784.0 Purpose.

It is the purpose of this part to provide an official statement of the views of the Department of Labor with respect to the meaning and application of sections 13(a)(5) and 13(b)(4) of the Fair Labor Standards Act, which govern the application of the minimum wage and overtime pay requirements of the Act to employees engaged in fishing and related activities and in operations on aquatic products. It is an objective of this part to make available in one place, the interpretations of law relating to such employment which will guide the Secretary of Labor and the Administrator in carrying out their responsibilities under the Act.

§ 784.1 General scope of the Act.

The Fair Labor Standards Act, as amended, is a Federal statute of general application which establishes minimum wage, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. Employers and employees in enterprises engaged in fishing and related activities, or in operations on aquatic products on shore, need to know how the Act applies to employment in these enterprises so that they may understand their rights and obligations under the law. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard and with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 784.2 Matters discussed in this part.

This part discusses generally the provisions of the Act which govern its application to employers and employees in enterprises and establishments of the fisheries, seafood processing, and related industries. It discusses in some detail those exemption provisions of the Act in sections 13(a)(5) and 13(b)(4) which refer specifically to employees employed in described activities with respect to seafood and other forms of aquatic life.

§ 784.3 Matters discussed in other interpretations.

Interpretations having general application to others subject to the law, as well as to fishermen and seafood canners, processors, or distributors and their employees, have been issued on a number of subjects of general interest. These will be found in other parts of this chapter. Reference should be made to them for guidance on matters which they discuss in detail, which this part does not undertake to do. They include Part 776 of this chapter, discussing coverage; Part 531 of this chapter, discussing payment of wages; Part 778 of this chapter, discussing computation and payment of overtime compensation; Part 785 of this chapter, discussing the calculation of hours worked; and Part 800 of this chapter, discussing equal pay for equal work. Reference should also be made to Subpart G of Part 570 of this chapter, which contains the official interpretations of the child labor provisions of the Act.

§ 784.4 Significance of official interpretations.

The regulations in this part contain the official interpretations of the Department of Labor pertaining to the exemptions provided in sections 13(a)(5) and 13(b)(4) of the Fair Labor Standards Act of 1938, as amended. It is intended that the positions stated will serve as "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift, 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act, unless and until they are otherwise directed by authoritative decisions of the courts or conclude upon re-examination of an interpretation that it is incorrect. The interpretations contained herein may be relied upon in accordance with section 10 of the Portal-to-Portal Act (29 U.S.C. 251-262), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

§ 784.5 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (Mitchell v. Zachry, 362 U.S. 310; Kirschbaum v. Walling, 316 U.S. 517). Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorganization Plan 6 of 1950, 64 Stat. 1263; Gen. Ord. 45 A, May 24, 1950; 15 FR 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

§ 784.6 Interpretations made, continued, and superseded by this part.

On and after publication of this Part 784 in the FEDERAL REGISTER, the interpretations contained therein shall be in effect, and shall remain in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as Part 784 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met by employers and employees in the application of the Act. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this bulletin may be addressed to the Administrator of the Wage and Hour Division, United States Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

SOME BASIC DEFINITIONS

§ 784.7 Definition of terms used in the Act.

The meaning and application of the provisions of law discussed in this part depend in large degree on the definitions of terms used in these provisions. The Act itself defines some of these terms. Others have been defined and construed in decisions of the courts. In the following sections some of these basic definitions are set forth for ready reference in connection with the part's discussion of the various provisions in which they appear. These definitions and their application are further considered in other interpretative bulletins to which reference is made, and in the sections of this part where the particular provisions containing the defined terms are discussed.

§ 784.8 "Employer," "employee," and "employ."

The Act's major provisions impose certain requirements and prohibitions on every "employer" subject to their terms. The employment by an "employer" of an "employee" is, to the extent specified in the Act, made subject to minimum wage and overtime pay requirements and to prohibitions against the employment of oppressive child labor. The Act provides its own definitions of "employer," "employee" and "employ," under which "economic reality" rather than "technical concepts" determines whether there is employment subject to its terms (Goldberg v. Whitaker House Cooperative, 366 U.S. 28; United States v. Silk, 331 U.S. 704; Rutherford Food Corp. v. McComb, 331 U.S. 722). An "employer," as defined in section 3(d) of the Act, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." An "employee," as defined in section 3(e) of the Act, "includes any individual employed by an employer," and "employ," as used in the Act, is defined in section 3(g) to include "to suffer or permit to work." It should be noted, as explained in Part 791 of this chapter, dealing with joint employment that in appropriate circumstances two or more employers may be jointly responsible for compliance with the statutory requirements applicable to employment of a particular employee. It should also be noted that "employer," "enterprise," and "establishment" are not synonymous terms, as used in the Act. An employer may have an enterprise with more than one establishment, or he may have more than one enterprise in which he employs employees within the meaning of the Act. Also, there may be different employers who employ employees in a particular establishment or enterprise.

§ 784.9 "Person."

As used in the Act (including the definition of "enterprise" set forth below in § 784.10), "person" is defined as meaning "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons" (Act, section 3(a)).

§ 784.10 "Enterprise."

The term "enterprise" which may, in some situations, be pertinent in determining coverage of this Act to employees employed by employers engaged in the procurement, processing, or distribution of aquatic products, is defined in section 3(r) of the Act, Section 3(r) states:

> Enterprise means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the relat-

ed activities performed for such enterprise by an independent contractor * * *.

The scope and application of this definition is discussed in Part 776 of this chapter.

§ 784.11 "Establishment."

As used in the Act, the term "establishment", which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (Phillips v. Walling, 324 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., first session, p. 25). This is the meaning of the term as used in sections 3(r) and 3(s) of the Act.

§ 784.12 "Commerce."

"Commerce" as used in the Act includes interstate and foreign commerce. It is defined in section 3(b) of the Act to mean "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." (For the definition of "State," see § 784.15.) The application of this definition and the kinds of activities which it includes are discussed at length in Part 776 of this chapter dealing with the general coverage of the Act.

§ 784.13 "Production."

To understand the meaning of "production" of goods for commerce as used in the Act it is necessary to refer to the definition in section 3(j) of the term "produced." A detailed discussion of the application of the term as defined is contained in Part 776 of this chapter, dealing with the general coverage of the Act. Section 3(j) provides that "produced" as used in the Act "means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." (For the definition of "State" see § 784.15.)

§ 784.14 "Goods."

The definition in section 3(i) of the Act states that "goods," as used in the Act, means "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." Part 776 of this chapter, dealing with the general coverage of the Act, contains a detailed discussion of the application of this definition and what is included in it.

§ 784.15 "State."

As used in the Act, "State" means "any State of the United States or the District of Columbia or any Territory or possession of the United States" (Act, section 3(c)). The application of this definition in determining questions of "coverage under the Act's definition of "commerce" and "produced" (see §§ 784.12, 784.13) is discussed in Part 776 of this chapter, dealing with general coverage.

§ 784.16 "Regular rate."

As explained in Part 778 of this chapter, dealing with overtime compensation, employees subject to the overtime pay provisions of the Act must generally receive for their overtime work in any workweek as provided in the Act not less than one and one-half times their regular rates of pay. Section 7(e) of the Act defines the term "regular rate" "to include all remuneration for employment paid to, or on behalf of, the employee" except certain payments which are expressly described in and excluded by the statutory definition. This definition, which is discussed at length in Part 778 of this chapter, determines the regular rate upon which time and one-half overtime compensation must be computed under section 7(a) of the Act for employees within its general coverage who are not exempt from the overtime provisions under either of the fishery and seafood exemptions provided by sections 13(a)(5) and 13(b)(4) or under some other exemption contained in the Act.

APPLICATION OF COVERAGE AND EXEMPTIONS PROVISIONS OF THE ACT

§ 784.17 Basic coverage in general.

Except as otherwise provided in specific exemptions, the minimum wage, overtime pay, and child labor standards of the Act are generally applicable to employees who engage in specified activities concerned with interstate or foreign commerce. The employment of oppressive child labor in or about establishments producing goods for such commerce is also restricted by the Act. The monetary and child labor standards of the Act are also generally applicable to other employees, not specifically exempted, who are employed in specified enterprises engaged in such commerce or in the production of goods for such commerce. The employer must observe the monetary standards with respect to all such employees in his employ except those who may be denied one or both of these benefits by virtue of some specific exemption provision of the Act, such as section 13(a)(5) or 13(b)(4). It should be noted that enterprises having employees subject to these exemptions may also have other employees who may be exempt under section 13(a)(1) of the Act, subject to conditions specified in regulations, as employees employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman. The regulations governing these exemptions are set forth and explained in Part 541 of this chapter.

§ 784.18 Commerce activities of employees.

The Fair Labor Standards Act has applied since 1938 to all employees, not specifically exempted, who are engaged (a) in interstate or foreign commerce or (b) in the production of goods for such commerce, which is defined to include any closely related process or occupation directly essential to such production (29 U.S.C. 206(a), 207(a); and see §§ 784.12 to 784.15 for definitions governing the scope of this coverage). In general, employees of businesses concerned with fisheries and with operations on seafood and other aquatic products are engaged in interstate or foreign commerce, or in the production of goods for such commerce, as defined in the Act, and are subject to the Act's provisions except as otherwise provided in sections 13(a)(5) and 13(b)(4) or other express exemptions. A detailed discussion of the activities in commerce or in the production of goods for commerce which will bring an employee under the Act is contained in Part 776 of this chapter, dealing with general coverage.

§ 784.19 Commerce activities of enterprise in which employee is employed.

Under amendments to the Fair Labor Standards Act employees not covered by reason of their personal engagement in interstate commerce activities, as explained in § 784.18, are nevertheless brought within the coverage of the Act if they are employed in an enterprise which is defined in section 3(s) of the Act as an enterprise engaged in commerce or in the production of goods for commerce. Such employees, if not exempt from minimum wages and overtime pay under section 13(a)(5) or exempt from overtime pay under section 13(b)(4), will have to be paid in accordance with the monetary standards of the Act unless expressly exempt under some other provision. This would generally be true of employees employed in enterprises and by establishments engaged in the procurement, processing, marketing, or distribution of seafood and other aquatic products, where the enterprise has an annual gross sales volume of not less than $250,000. Enterprise coverage is more fully discussed in Part 776 of this chapter, dealing with general coverage.

§ 784.20 Exemptions from the Act's provisions.

The Act provides a number of specific exemptions from the general requirements previously described. Some are exemptions from the overtime provisions only. Several are exemptions from both the minimum wage and the overtime requirements of the Act. Finally, there are some exemptions from all three—minimum wage, overtime pay, and child labor requirements. An examination of the terminology in which the exemptions from the general coverage of the Fair Labor Standards Act are stated discloses language patterns which reflect congressional intent. Thus, Congress specified in varying degree the criteria for application of each of the exemptions and in a number of instances differentiated as to whether employees are to be exempt because they are employed by a particular kind of employer, employed in a particular type of establishment, employed in a particular industry, employed in a particular capacity or occupation or engaged in a specified operation. (See 29 U.S.C. 203(d); 207 (b), (c), (l); 213 (a), (b), (c), (d). And see Addison v. Holly Hill, 322 U.S. 607; Mitchell v. Trade Winds, Inc., 289 F. 2d 278; Mitchell v. Stinson, 217 F. 2d (210). In general there are no exemptions from the child labor requirements that apply in enterprises or establishments engaged in fishing or in operations on aquatic products (see Part 570, Subpart G, of this chapter). Such enterprises or establishments will, however, be concerned with the exemption from overtime pay in section 13(b)(4) of the Act for employees employed in specified "onshore" operations (see § 784.101), and the exemption from minimum wages and overtime pay provided by section 13(a)(5) for employees employed in fishing, fish-farming, and other specified "off-shore" operations on aquatic products. These exemptions, which are subject to the general rules stated in § 784.21, are discussed at length in Subpart B of this Part 784.

§ 784.21 Guiding principles for applying coverage and exemption provisions.

It is clear that Congress intended the Fair Labor Standards Act to be broad in its scope. "Breadth of coverage is vital to its mission" (Powell v. U.S. Cartridge Co., 339 U.S. 497). An employer who claims an exemption under the Act has the burden of showing that it applies (Walling v. General Industries Co., 330 U.S. 545; Mitchell v. Kentucky Finance Co., 359 U.S. 290; Tobin v. Blue Channel Corp., 198 F. 2d 245, approved in Mitchell v. Myrtle Grove Packing Co., 350 U.S. 891; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52). Conditions specified in the language of the Act are "explicit prerequisites to exemption" (Arnold v. Kanowsky, 361 U.S. 388). In their application, the purpose of the exemption as shown in its legislative history as well as its language should be given effect. However, "the details with which the exemptions in this Act have been made preclude their enlargement by implication" and "no matter how broad the exemption, it is meant to apply only to" the specified activities (Addison v. Holly Hill, 322 U.S. 607; Maneja v. Waialua, 349 U.S. 254). Exemptions provided in the Act "are to be narrowly construed against the employer seeking to assert them" and their application limited to those who come "plainly and unmistakably within their terms and spirit." This construction of the exemptions is necessary to carry out the broad objectives for which the Act was passed (Phillips v. Walling, 324 U.S. 490; Mitchell v. Kentucky Finance Co., supra; Arnold v. Kanowsky, supra; Calaf v. Gonzales, 127 F. 2d 934; Bowie v. Gonzales, 117 F. 2d 11; Mitchell v. Stinson, 217 F. 2d 210; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52).

Subpart B—Exemptions Provisions Relating to Fishing and Aquatic Products

THE STATUTORY PROVISIONS

§ 784.100 The section 13(a)(5) exemption.

Section 13(a)(5) grants an exemption from both the minimum wage and the overtime requirements of the Act and applies to "any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee."

§ 784.101 The section 13(b)(4) exemption.

Section 13(b)(4) grants an exemption only from the overtime requirements of the Act and applies to "any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof."

LEGISLATIVE HISTORY OF EXEMPTIONS

§ 784.102 General Legislative history.

(a) As orginally enacted in 1938, the Fair Labor Standards Act provided an exemption from both the minimum wage requirements of section 6 and the overtime pay requirements of section 7 which was made applicable to "any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or by products thereof" (52 Stat. 1060, sec. 13(a)(5)).

(b) In 1949 the minimum wage was extended to employees employed in canning such products by deleting the word "canning" from the above exemption, adding the parenthetical phrase "(other than canning)" after the word "processing" therein, and providing a new exemption in section 13(b)(4), from overtime pay provisions only, applicable to "any employee employed in the canning of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof". All other employees included in the original minimum wage and overtime exemption remained within it (63 Stat. 910).

(c) By the Fair Labor Standards Amendments of 1961, both these exemptions were further revised to read as set forth in §§ 784.100 and 784.101. The effect of this change was to provide a means of equalizing the application of the Act as between canning employees and employees employed in other processing, marketing, and distributing of aquatic products on shore, to whom minimum wage protection, formerly provided only for canning employees, was extended by this action. The 1961 amendments, however, left employees employed in fishing, in fish farming, and in related occupations concerned with procurement of aquatic products from nature, under the existing exemption from minimum wages as well as overtime pay.

§ 784.103 Adoption of the exemption in the original 1938 Act.

Although in the course of consideration of the legislation in Congress before passage in 1938, provisions to exempt employment in fisheries and aquatic products activities took various forms, section 13(a)(5), as drafted by the conference committee and finally approved, followed the language of an amendment adopted during consideration of the bill by the House of Representatives on May 24, 1938, which was proposed by Congressman Bland of Virginia. He had earlier on the same day, offered an amendment which had as its objective the exemption of the "fishery industry," broadly defined. The amendment had been defeated (83 Cong. Rec. 7408), as had an amendment subsequently offered by Congressman Mott of Oregon (to a pending amendment proposed by Congressman Coffee of Nebraska) which would have provided an exemption for "industries engaged in producing, processing, distributing, or handling * * * fishery or seafood products which are seasonal or perishable" (83 Cong. Rec. 7421-7423). Against this background, when Congressman Bland offered his amendment which ultimately became section 13(a)(5) of the Act he took pains to explain: "This amendment is not the same. In the last amendment I was trying to define the fishery industry. I am now dealing with those persons who are exempt, and I call the attention of the Committee to the language with respect to the employment of persons in agriculture * * * I am only asking for the seafood and fishery industry that which has been done for agriculture." It was after this explanation that the amendment was adopted (83 Cong. Rec. 7443). When the conference committee included in the final legislation this provision from the House bill, it omitted from the bill another House provision granting an hours exemption for employees "in any place of employment" where the employer was "engaged in the processing of or in canning fresh fish or fresh seafood" and the provision of the Senate bill providing an hours exemption for employees "employed in connection with" the canning or other packing of fish, etc. (see Mitchell v. Stinson, 217 F. 2d 210; McComb v. Consolidated Fisheries, 75 F. Supp. 798). The indication in this legislative history that the exemption in its final form was intended to depend upon the employment of the particular employee in the specified activities is in accord with the position of the Department of Labor and the weight of judicial authority.

§ 784.104 The 1949 amendments.

In deleting employees employed in canning aquatic products from the section 13(a)(5) exemption and providing them with an exemption in like language from the overtime provisions only in section 13(b)(4), the conferees on the Fair Labor Standards Amendments of 1949 did not indicate any intention to change in any way the category of employees who would be exempt as "employed in the canning of" the aquatic products. As the Supreme Court has pointed out in a number of decisions, "When Congress amended the Act in 1949 it provided that pre-1949 rulings and interpretations by the Administrator should remain in effect unless inconsistent with the statute as amended 63 Stat. 920" (Mitchell v. Kentucky Finance Co., 359 U.S. 290). In connection with this exemption the conference report specifically indicates what operations are included in the canning process (see § 784.142). In a case decided before the 1961 amendments to the Act, this was held to "indicate that Congress intended that only those employees engaged in operations physically essential in the canning of fish, such as cutting the fish, placing it in cans, labelling and packing the cans for shipment are in the exempt category" (Mitchell v. Stinson, 217 F. 2d 210).

§ 784.105 The 1961 amendments.

(a) The statement of the Managers on the Part of the House in the conference report on the Fair Labor Standards Amendments of 1961 (H. Rept. No. 327, 87th Cong., first session, p. 16) refers to the fact that the changes made in sections 13(a)(5) and 13(b)(4) originated in the Senate amendment to the House bill and were not in the bill as passed by the House. In describing the Senate provision which was retained in the final legislation, the Managers stated that it "changes the exemption in the act for" the operations transferred to section 13(b)(4) from section 13(a)(5) "from a minimum wage and overtime exemption to an overtime only exemption." They further stated: "The present complete exemption is retained for employees employed in catching, propagating, taking, harvesting, cultivating, or farming fish and certain other marine products, or in the first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by such an employee." In the report of the Senate committee on the provision included in the Senate bill (S. Rept. No. 145, 87th Cong., first session, p. 33), the committee stated: "The bill would modify the minimum wage and overtime exemption in section 13(a)(5) of the Act for employees engaged in fishing and in specified activities on aquatic products." In further explanation, the report states that the bill would amend this section "to remove from this exemption those so-called onshore activities and leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products, including first processing, canning, or packing at sea performed as an incident to fishing operations, as well as employment in loading and unloading such products for shipment when performed by any employee engaged in these procurement operations." It is further stated in the report that "persons who are employed in the activities removed from the section 13(a)(5) exemption will have minimum wage protection but will continue to be exempt from the Act's overtime requirements under an amended section 13(b)(4). The bill will thus have the effect of placing fish processing and fish canning on the same basis under the Act. There is no logical reason for treating them differently and their inclusion within the Act's protection is desirable and consistent with its objectives."

(b) The language of the Managers on the Part of the House in the conference report and of the Senate committee in its report, as quoted above, is consistent with the position supported by the earlier legislative history and by the courts, that the exemption of an employee under these provisions of the Act depends on what he does. The Senate report speaks of the exemption "for employees engaged in fishing and in specified activities" and of the "activities now enumerated in this section." While this language confirms the legislative intent to continue to provide exemptions for employees employed in specified activities rather than to grant exemption on an industry, employer, or establishment basis (see Mitchell v. Trade Winds, Inc., 289 F. 2d 278), the report also refers with apparent approval to certain prior judicial interpretations indicating that the list of activities set out in the exemption provisions is intended to be "a complete catalog of the activities involved in the fishery industry" and that an employee to be exempt, need not engage directly in the physical acts of catching, processing, canning, etc. of aquatic products which are included in the operation specifically named in the statute (McComb v. Consolidated Fisheries Co., 174 F. 2d 74). It was stated that an interpretation of section 13(a)(5) and section 13(b)(4) which would include within their purview "any employee who participates in activities which are necessary to the conduct of the operations specifically described in the exemptions" is "consistent with the congressional purpose" of the 1961 amendments. (See Sen. Rep. No. 145, 87 Cong., first session, p. 33; Statement of Representative Roosevelt, 107 Cong. Rec. (daily ed.) p. 6716, as corrected May 4, 1961.) From this legislative history the intent is apparent that the application of these exemptions under the Act as amended in 1961 is to be determined by the practical and functional relationship of the employee's work to the performance of the operations specifically named in section 13(a)(5) and section 13(b)(4).

PRINCIPLES APPLICABLE TO THE TWO EXEMPTIONS

§ 784.106 Relationship of employee's work to the named operations.

It is clear from the language of section 13(a)(5) and section 13(b)(4) of the Act, and from their legislative history as discussed in §§ 784.102-784.105, that the exemptions which they provide are applicable only to those employees who are "employed in" the named operations. Under the Act as amended in 1961 and in accordance with the evident legislative intent (see § 784.105), an employee will be considered to be "employed in" an operation named in section 13(a)(5) or 13(b)(4) where his work is an essential and integrated step in performing such named operation (see Mitchell v. Myrtle Grove Packing Co., 350 U.S. 891, approving Tobin v. Blue Channel Corp., 198 F. 2d 245; Mitchell v. Stinson, 217 F. 2d 210), or where the employee is engaged in activities which are functionally so related to a named operation under the particular facts and circumstances that they are necessary to the conduct of such operation and his employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended (Mitchell v. Trade Winds, Inc., 289 F. 2d 278; see also Waller v. Humphreys, 133 F. 2d

193 and McComb v. Consolidated Fisheries Co., 174 F. 2d 74). Under these principles, generally an employee performing functions without which the named operations could not go on is, as a practical matter, "employed in" such operations. It is also possible for an employee to come within the exemption provided by section 13(a)(5) or section 13(b)(4) even though he does not directly participate in the physical acts which are performed on the enumerated marine products in carrying on the operations which are named in that section of the Act. However, it is not enough to establish the applicability of such an exemption that an employee is hired by an employer who is engaged in one or more of the named operations or that the employee is employed by an establishment or in an industry in which operations enumerated in section 13(a)(5) or section 13(b)(4) are performed. The relationship between what he does and the performance of the named operations must be examined to determine whether an application of the above-stated principles to all the facts and circumstances will justify the conclusion that he is "employed in" such operations within the intendment of the exemption provision.

§ 784.107 Relationship of employee's work to operations on the specified aquatic products.

It is also necessary to the application of the exemptions that the operation of which the employee's work is a part be performed on the marine products named in the Act. Thus the operations described in section 13(a)(5) must be performed with respect to "any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life." The operations enumerated in section 13(b)(4) must be performed with respect to "any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof". Work performed on products which do not fall within these descriptions is not within the exemptions (Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Mitchell v. Trade Winds, Inc., 289 F. 2d 278; Walling v. Haden, 153 F. 2d 196).

§ 784.108 Operations not included in named operations on forms of aquatic "life."

Since the subject matter of the exemptions is concerned with "aquatic forms of animal and vegetable life," the courts have held that the manufacture of buttons from clam shells or the dredging of shells to be made into lime and cement are not exempt operations because the shells are not living things (Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Walling v. Haden, 153 F. 2d 196, certiorari denied 328 U.S. 866). Similarly, the production of such items as crushed shell and grit, shell lime, pearl buttons, knife handles, novelties, liquid glue, isinglass, pearl essence, and fortified or refined fish oil is not within these exemptions.

§ 784.109 Manufacture of supplies for named operations is not exempt.

Employment in the manufacture of supplies for the named operations is not employment in the named operations on aquatic forms of life. Thus, the exemption is not applicable to the manufacture of boxes, barrels, or ice by a seafood processor for packing or shipping its seafood products or for use of the ice in its fishing vessels. These operations, when performed by an independent manufacturer, would likewise not be exempt (Dize v. Maddix, 144 F. 284 (C.A. 4), affirmed 324 U.S. 667, and approved on this point in Farmers' Reservoir Co. v. McComb, 337 U.S. 755).

§ 784.110 Performing operations both on nonaquatic products and named aquatic products.

By their terms, sections 13(a)(5) and 13(b)(4) provide no exemption with respect to operations performed on any products other than the aquatic products named in these subsections (see § 784.107). Accordingly, neither of the exemptions is applicable to the making of any commodities from ingredients only part of which consist of such aquatic products, if a substantial amount of other products is contained in the commodity so produced (compare Walling v. Bridgeman-Russell Co., 6 Labor Cases 61, 422, 2 WH Cases

785 (D. Minn.) and Miller v. Litchfield Creamery Co., 11 Labor Cases 63, 274, 5 WH Cases 1039 (N.D. Ind.), with Mitchell v. Trade Winds, Inc., 289 F. 2d 278). Thus, the first processing, canning, or processing of codfish cakes, clam chowder, dog food, crab cakes, or livestock food containing aquatic products is often not exempt within the meaning of the relevant exemptions.

§ 784.111 Operations on named products with substantial amounts of other ingredients are not exempt.

To exempt employees employed in first processing, canning, or processing products composed of the named commodities and a substantial amount of ingredients not named in the exemptions would be contrary to the language and purposes of such exemptions which specifically enumerate the commodities on which exempt operations were intended to be performed. Consequently, in such situations all operations performed on the mixed products at and from the time of the addition of the foreign ingredients, including those activities which are an integral part of first processing, canning, or processing are nonexempt activities. However, activities performed in connection with such operations on the named aquatic products prior to the addition of the foreign ingredients are deemed exempt operations under the applicable exemption. Where the commodity produced from named aquatic products contains an insubstantial amount of products not named in the exemption, the operations will be considered as performed on the aquatic products and handling and preparation of the foreign ingredients for use in the exempt operations will also be considered as exempt activities.

§ 784.112 Substantial amounts of nonaquatic products; enforcement policy.

As an enforcement policy in applying the principles stated in §§ 784.110 and 784.111, if more than 20 percent of a commodity consists of products other than aquatic products named in section 13(a)(5) or 13(b)(4), the commodity will be deemed to contain a substantial amount of such nonaquatic products.

§ 784.113 Work related to named operations performed in off- or dead-season.

Generally, during the dead or inactive season when operations named in section 13(a)(5) or 13(b)(4) are not being performed on the specified aquatic forms of life, employees performing work relating to the plant or equipment which is used in such operations during the active seasons are not exempt. Illustrative of such employees are those who repair, overhaul, or recondition fishing equipment or processing or canning equipment and machinery during the off-season periods when fishing, processing, or canning is not going on. An exemption provided for employees employed "in" specified operations is plainly not intended to apply to employees employed in other activities during periods when the specified operations are not being carried on, where their work is functionally remote from the actual conduct of the operations for which exemption is provided and is unaffected by the natural factors which the Congress relied on as reason for exemption. The courts have recognized these principles. See Maneja v. Waialua, 349 U.S. 254; Mitchell v. Stinson, 217 F. 2d 210; Maisonet v. Central Coloso, 6 Labor Cases (CCH) par. 61,337, 2 WH Cases 753 (D. P.R.); Abram v. San Joaquin Cotton Oil Co., 49 F. Supp. 393 (S.D. Calif.), and Heaburg v. Independent Oil Mill Inc., 46 F. Supp. 751 (W.D. Tenn.). On the other hand, there may be situations where employees performing certain preseason or postseason activities immediately prior or subsequent to carrying on operations named in sections 13(a)(5) or section 13(b)(4) are properly to be considered as employed "in" the named operations because their work is so close in point of time and function to the conduct of the named operations that the employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended. Depending on the facts and circumstances, this may be true, for example, of employees who perform such work as placing boats and other equipment in condition for use at the beginning of the fishing season, and taking the necessary protective measures with respect to such equipment which are required in connection with termination of the named operations at the end of the season. Where such work is integrated with and is required for the actual conduct of the named operations on the specified aquatic forms of life, and is necessarily performed immediately before or immediately after such named operations, the employees performing it may be considered as employed in the named operations, so as to come within the exemption. It should be kept in mind that the relationship between the work of an employee and the named operations which is required for exemption is not necessarily identical with the relationship between such work and the production of goods for commerce which is sufficient to establish its general coverage under the Act. Thus, repair, overhaul, and reconditioning work during the inactive season which does not come within the exemption is nevertheless closely related and directly essential to the production of goods for commerce which takes place during the active season and, therefore, is subject to the provisions of the Act (Farmers' Reservoir Co. v. McComb, 337 U.S. 755; Mitchell v. Stinson, 217 F. 2d 210; Bowie v. Gonzalez, 117 F. 2d 11; Weaver v. Pittsburgh Steamship Co., 153 F. 2d 597, cert., den., 328 U.S. 858).

§ 784.114 Application of exemptions on a workweek basis.

The general rule that the unit of time to be used in determining the application of the exemption to an employee is the workweek (see Overnight Motor Transportation Co. v. Missel, 316 U.S. 572; Mitchell v. Stinson, 217 F. 2d 210; Mitchell v. Hunt. 263 F. 2d 913; Puerto Rico Tobacco Marketing Co-op. Ass'n. v. McComb, 181 F. 2d 697). Thus, the workweek is the unit of time to be taken as the standard in determining the applicability to an employee of section 13(a)(5) or section 13(b)(4) (Mitchell v. Stinson, supra). An employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It may begin at an hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted. If in any workweek an employee does only exempt work he is exempt from the wage and hours provisions of the Act during that workweek, irrespective of the nature of his work in any other workweek or workweeks. An employee may thus be exempt in one workweek and not the next (see Mitchell v. Stinson, supra). But the burden of effecting segregation between exempt and nonexempt work as between particular workweeks is on the employer (see Tobin v. Blue Channel Corp., 198 F. 2d 245).

§ 784.115 Exempt and noncovered work performed during the workweek.

The wage and hours requirements of the Act do not apply to any employees during any workweek in which a portion of his activities falls within section 13(a)(5) if no part of the remainder of his activities is covered by the Act. Similarly, the overtime requirements are inapplicable in any workweek in which a portion of an employee's activities falls within section 13(b)(4) if no part of the remainder of his activities is covered by the Act. Covered activities for purposes of the above statements mean engagement in commerce, or in the production of goods for commerce, or in an occupation closely related or directly essential to such production or employment in an enterprise engaged in commerce or in the production of goods for commerce, as explained in §§ 784.17 through 784.19.

§ 784.116 Exempt and nonexempt work in the same workweek.

Where an employee, during any workweek, performs work that is exempt under section 13(a)(5) or 13(b)(4), and also performs nonexempt work, some part of which is covered by the Act, the exemption will be deemed inapplicable unless the time spent in performing nonexempt work during that week is not substantial in amount. For enforcement purposes, nonexempt work will be considered substantial in amount if more than 20 percent of the time worked by the employee in a given workweek is devoted to such work (see Mitchell v. Stinson, 217 F. 2d 210). Where exempt and nonexempt work is performed during a workweek by an employee and is not or cannot be segregated so as to permit separate measurement of the time spent in each, the employee will not be exempt (see Tobin v. Blue Channel Corp., 198 F. 2d 245; Walling v. Public Quick Freezing and Cold Storage Co., 62 F. Supp. 924).

§ 784.117 Combinations of exempt work.

The combination of exempt work under sections 13(a)(5) and 13(b)(4), or one of these sections with exempt work under another section of the Act, is permitted. Where a part of an employee's covered work in a workweek is exempt under section 13(a)(5) and the remainder is exempt under another section which grants an exemption from the minimum wage and overtime provisions of the Act, the wage and hours requirements are not applicable. If the scope of the exemption is not the same, however, the exemption applicable to the employee is that provided by whichever exemption provision is more limited in scope unless, of course, the time spent in performing work which is nonexempt under the broader exemption is not substantial. For example, an employee may devote part of his workweek to work within section 13(b)(4) and the remainder to work exempt from both the minimum wage and overtime requirements under another section of the Act. In such a case he must receive the minimum wage but is not required to receive time and one-half for his overtime work during that week (C.F. Mitchell v. Myrtle Grove Packing Co., 350 U.S. 891; Tobin v. Blue Channel Corp., 198 F. 2d 245). Each activity is tested separately under the applicable exemption as though it were the sole activity of the employee for the whole workweek in question. Unless the employee meets all the requirements of each exemption a combination exemption would not be available.

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(a)(5) EXEMPTION

§ 784.118 The exemption is intended for work affected by natural factors.

As indicated by the legislative history, the purpose of the section 13(a)(5) exemption is to exempt from the minimum wage and overtime provisions of the Act employment in those activities in the fishing industry that are controlled or materially affected by natural factors or elements, such as the vicissitudes of the weather, the changeable conditions of the water, the run of the catch, and the perishability of the products obtained (83 Cong. Rec. 7408, 7443; S. Rep. No. 145, p. 33 on H.R. 3935, 87th Cong., first session; Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; Walling v. Haden, 153 F. 2d 196, certiorari denied 328 U.S. 866).

§ 784.119 Effect of natural factors on named operations.

The various activities enumerated in section 13(a)(5)—the catching, taking, propagating, harvesting, cultivating, or farming of aquatic forms of animal or vegetable life as well as "the going to and returning from work" are materially controlled and affected by the natural elements. Similarly, the activities of "first processing, canning, or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations" are subject to the natural factors mentioned above. The "loading and unloading" of such aquatic products when performed at sea are also subject to the natural forces.

§ 784.120 Application of exemption to "offshore" activities in general.

The expression "offshore activities" is used to describe the category of named operations pertaining to the acquisition from nature of aquatic forms of animal and vegetable life. As originally enacted in 1938, section 13(a)(5) exempted not only employees employed in such "offshore" or "trip" activities but also employees employed in related activities on shore which were similarly affected by the natural factors previously discussed (see § 784.103, and Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52). However, the intent of the 1961 amendments to the Act was to remove from the exemption the so-called onshore activities and "leave the exemption applicable to 'offshore' activities connected with the procurement of the aquatic products" (S. Rep. 145, 87th Cong., first session, p. 33). Despite its comprehensive reach (see §§ 784.105 and 784.106), the exemption, like the similar exemption is the Act for agriculture, is "meant to apply only" to the activities named in the statute (see Maneja v. Waialua, 349 U.S. 254; Farmers Reservoir Co. v. McComb, 337 U.S. 755).

§ 784.121 Exempt fisheries operations.

Employees engaged in the named operations, such at "catching" or "taking," are clearly exempt. As indicated in § 784.106, employees engaged in activities that are "directly and necessarily a part of" an enumerated operation are also exempt (Mitchell v. Trade Winds, Inc., 289 F. 2d 278). The "catching, taking, propagating, harvesting, cultivating, or farming" of the various forms of aquatic life includes not only the actual performance of the activities, but also the usual duties inherent in the occupations of those who perform the activities. Thus, the fisherman who is engaged in "catching" and "taking" must see to it that his lines, nets, seines, traps, and other equipment are not fouled and are in working order. He may also have to mend or replace his lines or nets or repair or construct his traps. Such activities are an integral part of the operations of "catching" and "taking" of an aquatic product.

§ 784.122 Operations performed as an integrated part of fishing.

Certain other activities performed on a fishing vessel in connection with named operations are, functionally and as a practical matter, directly and necessarily a part of such operations. For example, maintenance work performed by members of the fishing crew during the course of the trip on the fishing boat would necessarily be a part of the fishing operation, since the boat itself is as much a fishing instrument as the fishing rods or nets. Similarly, work required on the vessel to keep in good operating condition any equipment used for processing, canning, or packing the named aquatic products at sea is so necessary to the conduct of such operations that it must be considered a part of them and exempt.

§ 784.123 Operations performed on fishing equipment.

On the principle stated in § 784.122 the replacement, repair, mending, or construction of the fisherman's equipment performed at the place of the fishing operation would be exempt. Such activities performed in contemplation of the trip are also within the exemption if the work is so closely related both in point of time and function to the acquisition of the aquatic life that it is really a part of the fishing operation or of "going to * * * work." For example, under appropriate facts, the repair of the nets, or of the vessel, or the building of fish trap frames on the shore immediately prior to the opening of the fishing season would be within the exemption. Activities at the termination of a fishing trip which are similarly related in time and function to the actual conduct of fishing operations or "returning from work" may be within the exemption on like principles. Similarly, the fact that the exemption is intended generally for "offshore" activities does not mean that it may not apply to employment in other activities performed on shore which are so integrated with the conduct of actual fishing operations and functionally so necessary thereto that the employment is, in practical effect, directly and necessarily a part of the fishing operations for which the exemption is intended. In such circumstances the exemption will apply, for example, to an employee employed by a vessel owner to watch the fishing vessel, its equipment, and the catch when it comes to port, checks the mooring lines, operate bilge pumps and heating and cooling systems on the vessel, and assist in the loading and unloading of the fishing equipment and the catch. Work of the kinds referred to may be exempt when performed by the fisherman himself or necessary to the conduct of the fishing organization. However, the exemption would not apply to employees of a manufacturer of supplies or to employees of independent shops which repair boats and equipment. (Dize v. Maddix, 144 F. 2d 584, affirmed 324 U.S. 697.)

§ 784.124 Going to and returning from work.

The phrase "including the going to and returning from work" relates to the preceding named operations which pertain to the procuring and appropriation of seafood and other forms of aquatic life from nature. The expression obviously includes the time spent by fishermen and others who go to and from the fishing grounds or other locations where the aquatic life is reduced to possession. If going to work requires fishermen to prepare and carry the equipment required for the fishing operation, this would be included within the exemption. In performing such travel the fishermen may be required to row, guide or sail the boat or otherwise assist in its operation. Similarly, if an employee were digging for clams or other shellfish or gathering seaweed on the sand or rocks it might be necessary to drive a truck or other vehicle to reach his destination. Such activities are exempt within the meaning of this language. However, the phrase does not apply to employees who are not employed in the activities involved in the acquisition of aquatic animal or vegetable life, such as those going to or returning from work at processing or refrigerator plants or wholesale establishments.

§ 784.125 Loading and unloading.

The term "loading and unloading" applies to activities connected with the removal of aquatic products from the fishing vessel and their initial movement to markets or processing plants. The term, however, is not without limitation. The statute by its clear language makes these activities exempt only when performed by any employee employed in the procurement activities enumerated in section 13(a)(5). This limitation is confirmed by the legislative history of the 1961 amendments which effectuated this change in the application of this term (S. Rep. 145, 87th Cong., first session, p. 33). Consequently, members of the fishing crew engaged in loading and unloading the catch of the vessel to another vessel at sea, or at the dockside would be engaging in exempt activities within the meaning of section 13(a)(5). On the other hand, dock workers performing the same kind of tasks would not be within the exemption.

§ 784.126 Operation of the fishing vessel.

In extending the minimum wage to seamen on American vessels by limiting the exemption from minimum wages and overtime provided by section 13(a)(12) of the Act to "any employee employed as a seaman on a vessel other than an American vessel", and at the same time extending the minimum wage to "onshore" but not "offshore" operations concerned with aquatic products, the Congress, in the 1961 amendments to the Act, did not indicate any intent to remove the crews of fishing vessels engaged in operations named in section 13(a)(5) from the exemption provided by that section. The exemption provided by section 13(a)(12), above noted, and the general exemption in section 13(b)(6) from overtime for "any employee employed as a seaman" (whether or not on an American vessel) apply, in general to employees, working aboard vessels, whose services are rendered primarily as an aid to navigation. It appears, however, that it is not the custom or practice in the fishing industry for a fishing vessel to have two crews; namely, a fishing crew whose duty it is primarily to fish and to perform other duties incidental thereto and a navigational crew whose duty it is primarily to operate the boat. Where, as is the typical situation, there is but one crew which performs all these functions, the section 13(a)(5) exemptions would apply to its members. For a further explanation of the seaman's exemption, see Part 783 of this chapter.

§ 784.127 Office and clerical employees under section 13(a)(5).

Office and clerical employees, such as bookkeepers, stenographers, typists, and others who perform general office work of a firm engaged in operating fishing boats are not for that reason within the section 13(a)(5) exemption. Under the principles stated in § 784.106, their general office activities are not a part of any of the named operations even when they are selling, taking, and putting up orders, on recording sales, taking cash or making telephone connections for customer or dealer calls. Employment in the specific activities enumerated in the preceding sentence would ordinarily, however, be exempt under section 13(b)(4) since such activities constitute "marketing" or "distributing" within the meaning of that exemption (see § 784.153). In certain circumstances, office or clerical employees may come within the section 13(a)(5) exemption. If, for example, it is necessary to the conduct of the fishing operations that such employees accompany a fishing expedition to the fishing grounds to perform certain work required there in connection with the catch, their employment under such circumstances may, as a practical matter, be directly and necessarily a part of the operations for which exemption was intended, in which event the exemption would apply to them.

FIRST PROCESSING, CANNING, OR PACKING OF MARINE PRODUCTS UNDER SECTION 13(a)(5)

§ 784.128 Requirements for exemption of first processing, etc., at sea.

A complete exemption from minimum and overtime wages is provided by section 13(a)(5) for employees employed in the operations of first processing, canning, or packing of marine products at sea as an incident to, or in conjunction with "such" fishing operations—that is, the fishing operations of the fishing vessel (S. Rep. 145, 87th Cong., first session, p. 33). To qualify under this part of the exemption, there must be a showing that (a) the work of the employees is such that they are, within the meaning of the Act, employed in one or more of the named operations of first processing, canning or packing, (b) such operations are performed as an incident to, or in conjunction with, fishing operations of the vessel, (c) such operations are performed at sea, and (d) such operations are performed on the marine product specified in the statute.

§ 784.129 "Marine products".

The marine products which form the basis of the exemption are the "fish, shellfish, crustaceas, sponges, seaweeds, or other aquatic forms of animal and vegetable life" mentioned in section 13(a)(5). The exemption contemplates aquatic products currently or recently acquired and in the form obtained from the sea, since the language of the exemption clearly indicates the named operations of first processing, canning, or packing must be performed "at sea" and "as an incident to or in conjunction with", fishing operations. Also, such "marine products" are limited to aquatic forms of "life."

§ 784.130 "At sea."

The "at sea" requirement must be construed in context and in such manner as to accomplish the statutory objective. The section 13(a)(5) exemption is for the "catching, taking, propagating, harvesting," etc., of "aquatic forms of animal and vegetable life." There is no limitation as to where these activities must take place other than, as the legislative history indicates, that they are "offshore" activities. Since the purpose of the 1961 amendments is to exempt the "first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations," it would frustrate this objective to give the phrase "at sea" a technical or special meaning. For example, to define "at sea" to include only bodies of water subject to the ebb and flow of the tides or to saline waters would exclude the Great Lakes which obviously would not comport with the legislative intent. On the other hand, one performing the named activities of first processing, canning, or packing within the limits of a port or harbor is not performing them "at sea" within the meaning of the legislative intent although the situs of performance is subject to tidewaters. In any event it would not appear necessary to draw a precise line as to what constitutes "at sea" operations, for, as a practical matter, such first processing, canning, or packing operations are those closely connected with the physical catching of the fish and are performed on the fishing vessel shortly or immediately following the "catching" and "taking" of the fish.

§ 784.131 "As an incident to, or in conjunction with", fishing operations.

The statutory language makes clear that the "first processing, canning, or packing," unlike the other named operations of "catching, taking, propagating, harvesting, cultivating, or farming" are not exempt operations in and of themselves. They are exempt only when performed "as an incident to, or in conjunction with such fishing operations" (see Farmers Reservoir Co. v. McComb, 337 U.S. 755). It is apparent from the context that the language "such fishing operations" refers to the principal named operations of "catching, taking, propagating, harvesting, cultivating, or farming" as performed by the fishermen or fishing vessel (compare Bowie v. Gonzales, 117 F. 2d 11). Therefore to be "an incident to, or in conjunction with such fishing operations", the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. This is made abundantly clear by the legislative history. In Senate Report No. 145, 87th Congress, first session, at page 33, it pointed out:

> For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the "first processing, canning, or packing" of marine products "at sea as an incident to, or in conjunction with such fishing operations." The purpose of this additional provision is to make certain that the Act will be uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel.

In accordance with this purpose of the section, the exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels (cf. Mitchell v. Hunt, 263 F. 2d 913; Farmers Reservoir Co. v. McComb, 337 U.S. 755).

§ 784.132 The exempt operations.

The final requirement is that the employee on the fishing vessel must be employed in "the first processing, canning or packing" of the marine products. The meaning and scope of these operations when performed at sea as an incident to the fishing operations of the vessel are set forth in §§ 784.133 to 784.135. To be "employed in" such operations the employee must, as previously explained (see §§ 784.106 and 784.121), be engaged in work which is clearly part of the named activity.

§ 784.133 "First processing."

Processing connotes a change from the natural state of the marine product and first processing would constitute the first operation or series of continuous operations that effectuate this change. It appears that the first processing operations ordinarily performed on the fishing vessels at sea consist for the most part of eviscerating, removal of the gills, beheading certain fish that have large heads, and the removal of the scallop from its shell. Icing or freezing operations, which ordinarily immediately follow these operations, would also constitute an integral part of the first processing operations, as would such activities as filleting, cutting, scaling, or salting when performed as part of a continuous series of operations. Employment aboard the fishing vessel in freezing operations thus performed is within the exemption if the first processing of which it is a part otherwise meets the conditions of section 13(a)(5), notwithstanding the transfer by the 1961 amendments of "freezing", as such, from this exemption to the exemption from overtime only provided by section 13(b)(4). Such preliminary operations as cleaning, washing, and grading of the marine products, though not exempt as first processing since they effect no change, would be exempt as part of first processing when done in preparation for the first processing operation described above including freezing. The same would be true with respect to the removal of the waste products resulting from the above described operations on board the fishing vessel.

§ 784.134 "Canning."

The term "canning" was defined in the legislative history of the 1949 amendments (House (Conference) Report No. 1453, 81st Cong., first session; 95 Cong. Rec. 14878, 14932-33). These amendments made the "canning" of marine products or byproducts exempt from overtime only under a separate exemption (section 13(b)(4), and subject to the minimum wage requirements of the Act (see § 784.136 et seq.). The same meaning will be accorded to "canning" in section 13(a)(5) as in section 13(b)(4) (see § 784.142 et seq.) subject, of course, to the limitations necessarily imposed by the context in which it is found. In other words, although certain operations as described in § 784.142 et seq. qualify as canning, they are, nevertheless, not exempt under section 13(a)(5) unless they are performed on marine products by employees of the fishing vessel at sea as an incident to, or in conjunction with the fishing operations of the vessel.

§ 784.135 "Packing."

The packing of the various named marine products at sea as an incident to, or in conjunction with, the fishing operations of the vessel is an exempt operation. The term "packing" refers to the placing of the named product in containers, such as boxes, crates, bags, and barrels. Activities such as washing, grading, sizing, and placing layers of crushed ice in the containers are deemed a part of packing when performed as an integral part of the packing operation. The packing operation may be a simple or complete and complex operation depending upon the nature of the marine product, the length of time out and the facilities aboard the vessel. Where the fishing trip is of short duration, the packing operation may amount to no more than the simple operation, of packing the product in chipped or crushed ice in wooden boxes, as in the case of shrimp, or placing the product in wooden boxes and covering with seaweed as in the case of lobsters. Where the trips are of long duration, as for several weeks or more, packing the operations on fishing vessels with the proper equipment sometimes are integrated with first processing operations so that together these operations amount to readying the product in a marketable form. For example, in the case of shrimp, the combined operations may consist of the following series of operations—washing, grading, sizing, placing 5-pound boxes already labeled for direct marketing, placing in trays with other boxes, loading into a quick freezer locker, removing after freezing, emptying the box, glazing the contents with a spray of fresh water, replacing the box, putting them in 50-pound master cartons and finally stowing in refrigerated locker.

GENERAL CHARACTER AND SCOPE OF THE SECTION 13(a)(4) EXEMPTION

§ 784.136 "Shore" activities exempted under section 13(b)(4).

Section 13(b)(4) provides an exemption from the overtime but not from the minimum wage provisions of the Act for "any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing" aquatic forms of animal and vegetable life or any byproducts thereof. Orginally, all these operations were contained in the exemption provided by section 13(a)(5) but, as a result of amendments, first "canning", in 1949, and then the other operations in 1961, were transferred to section 13(b)(4). (See the discussion in §§ 784.102 to 784.105.) These activities are "shore" activities and in general have to do with the movement of the perishable aquatic products to a nonperishable state or to points of consumption (S. Rept. 145, 87th Cong., first session, p. 33).

§ 784.137 Relationship of exemption to exemption for "offshore" activities.

The reasons advanced for exemption of employment in "shore" operations, now listed in section 13(b)(4), at the time of the adoption of the original exemption in 1938, had to do with the difficulty of regulating hours of work of those whose operations, like those of fishermen, were stated to be governed by the time, size, availability, and perishability of the catch, all of which were considered to be affected by natural factors that the employer could not control (see 83 Cong. Rec. 7408, 7422, 7443). The intended limited scope of the exemption in this respect was not changed by transfer of the "shore" activities from section 13(a)(5) to section 13(b)(4). The exemption of employment in these "shore" operations may be considered, therefore, as intended to implement and supplement the exemption for employment in "offshore" operations provided by section 13(a)(5), by exempting from the hours provisions of the Act employees employed in those "shore" activities which are necessarily somewhat affected by the same natural factors. These "shore" activities are affected primarily, however, by fluctuations in the supply of the product or by the necessity for consumption or preservation of such products before spoilage occurs (see Fleming v. Hawkeye Pearl Button Co., 113 F. 2d 52; cf. McComb v. Consolidated Fisheries, 174 F. 2d 74).

§ 784.138 Perishable state of the aquatic product as affecting exemption.

(a) Activities performed after conversion of an aquatic product to a nonperishable state cannot form the basis for application of the section 13(b)(4) exemption unless the subsequent operation is so integrated with the performance of exempt operations on the aquatic forms of animal and vegetable life mentioned in the section that functionally and as a practical matter it must be considered a part of the operations for which exemption was intended. The exemption is, consequently, not available for the handling or shipping of nonperishable products by an employer except where done as a part of named operations commenced on the product when it was in a perishable state. Thus, employees of dealers in or distributors of such nonperishable products as fish oil and fish meal, or canned seafood, are not within the exemption. Similarly, there is no basis for application of the exemption to employees employed in further processing of or manufacturing operations on products previously rendered nonperishable, such as refining fish oil or handling fish meal in connection with the manufacture of feeds. Further specific examples of application of the foregoing principle are given in the subsequent discussion of particular operations named in section 13(b)(4).

(b) In applying the principle stated in paragraph (a) of this section, the Department has not asserted that the exemption is inapplicable to the performance of the operations described in section 13(b)(4) on frozen, smoked, salted, or cured fish. The Department will continue to follow this policy until further clarification from the courts.

§ 784.139 Scope of exempt operations in general.

Exemption under section 13(b)(4), like exemption under section 13(a)(5), depends upon the employment in the actual activities named in the section, and an employee performing a function which is not necessary to the actual conduct of a named activity, as explained in § 784.106, is not within the exemption. It is also essential to exemption that the operations named in section 13(b)(4) be performed on the forms of aquatic life specified in the section and not on other commodities a substantial part of which consists of materials or products other than the named aquatic products. Application of these principles has been considered generally in the earlier discussion, and further applications will be noted in the following sections and in the subsequent discussion of particular operations mentioned in the section 13(b)(4) exemption.

§ 784.140 Fabrication and handling of supplies for use in named operations.

(a) As noted in § 784.109, the exemption for employees employed "in" the named operations does not extend to an employee by reason of the fact that he engages in fabricating supplies for the named operations. Employment in connection with the furnishing of supplies for the processing or canning operations named in section 13(b)(4) is not exempt as employment "in" such named operations unless the functional relationship of the work to the actual conduct of the named operations is such that, as a practical matter, the employment is directly and necessarily a part of the operations for which exemption is intended. Employees who meet the daily needs of the canning or processing operations by delivering from stock, handling, and working on supplies such as salt, condiments, cleaning supplies, containers, etc., which must be provided as needed if the named operations are to continue, are within the exemption because such work is, in practical effect, a part of the operations for which exemption is intended. On the other hand, the receiving, unloading, and storing of such supplies during seasons when the named operations are not being carried on for subsequent use in the operations expected to be performed during the active season, are ordinarily too remote from the actual conduct of the named operations to come within the exemption (see § 784.113), and are not affected by the natural factors (§ 784.137) which were considered by the Congress to constitute a fundamental reason for providing the exemption. Whether the receiving, unloading, and storing of supplies during periods when the named operations are being carried on are functionally so related to the actual conduct of the operations as to be, in practical effect, a part of the named operations and within the exemption, will depend on all the facts and circumstances of the particular situation and the manner in which the named operations are carried on. Normally where such activities are directed to building up stock for use at a relatively remote time and there is no direct integration with the actual conduct of the named operations, the exemption will not apply.

(b) It may be that employees are engaged in the same workweek in performing exempt and nonexempt work. For example, a shop machinist engaged in making a new part to be used in the repair of a machine currently used in canning operations would be doing exempt work. If he also in the same workweeks makes parts to be used in a manufacturing plant operated by his employer, this work, since it does not directly or necessarily contribute to the conduct of the canning operations, would be nonexempt work causing the loss of the exemption if such work occupied a substantial amount (for enforcement purposes, more than 20 percent) of the employee's worktime in that workweek (see § 784.116 for a more detailed discussion).

§ 784.141 Examples of nonexempt employees.

An employer who engaged in operations specified in section 13(b)(4) which he performs on the marine products and byproducts described in that section may operate a business which engages also in operations of a different character or one in which some of the activities carried on are not functionally necessary to the conduct of operations named in section 13(b)(4). In such a business there will ordinarily be, in addition to the employees employed in such named operations, other employees who are nonexempt because their work is concerned entirely or in substantial part with carrying on activities which constitute neither the actual engagement in the named operations nor the performance of functions which are, as a practical matter, directly and necessarily a part of their employer's conduct of such named operations. Ordinarily, as indicated in § 784.156, such nonexempt employees will not be employed in an establishment which is exclusively devoted by the employer to the named operations during the period of their employment. It is usually when the named operations are not being *carried on, or in places wholly* or partly devoted to other operations, that employees of such an employer will be performing functions which are not so necessarily related to the conduct of the operations named in section 13(b)(4) as to come within the exemption. Typical illustrations of the occupations in which such nonexempt workers may be found (although employment in such an occupation does not necessarily mean that the worker is nonexempt) are the following: General office work (such as maintaining employment, social security, payroll and other records, handling general correspondence, etc., as distinguished from "marketing" or "distributing" work like that described in § 784.155), custodial, maintenance, watching, and guarding occupations; furnishing food, lodging, transportation, or nursing services to workers; and laboratory occupations such as those concerned with development of new products. Such workers are, of course, not physically engaged in operations named in section 13(b)(4) in the ordinary case, and they are not exempt unless they can be shown to be "employed in" such operations on other grounds. But any of them may come within the exemption in a situation where the employer can show that the functions which they perform, in view of all the facts and circumstances under which the named operations are carried on, are actually so integrated with or essential to the conduct of the named operations as to be, in practical effect directly and necessarily a part of the operations for which exemption was intended. Thus, for example, if canning operations described in section 13(b)(4) are carried on in a location where the canning employees cannot obtain necessary food unless the canner provides it, his employment of culinary employees to provide such food is functionally so necessary to the conduct of the canning operations that their work is, as a practical matter, a part of such operations, and the exemption will apply to them. On like principle, the exemption may apply to a watchman whose services are required during performance of the named operations in order to guard against spontaneous combustion of the products of such operations and other occurrences which may jeopardize the conduct of the operations.

"CANNING"

§ 784.142 Meaning and scope of "canning" as used in section 13(b)(4).

Section 13(b)(4) exempts any employee employed in the canning of aquatic forms of animal or vegetable life or byproducts thereof from the overtime requirements of the Act. As previously stated, it was made a limited exemption by the Fair Labor Standards Amendments of 1949. The legislative history of this section in specifically explaining what types of activities are included in the term "canning" and the antecedents from which this section evolved make it clear that the exemption applies to those employees employed in the activities that Congress construed as being embraced in the term and not to all those engaged in the fish canning industry (Mitchell v. Stinson, 217 F. 2d 214). Congress defined Report No. 1453, 81st Cong., first session 95 Cong. Rec. 14878, 14932-33) as follows:

> Under the conference agreement "canning" means hermetically sealing and sterilizing or pasteurizing and has reference to a process involving the performance of such operations. It also means other operations performed in connection therewith such as necessary preparatory operations performed on the products before they are placed in bottles, cans, or other containers to be hermetically sealed, as well as the actual placing of the commodities in such containers. Also included are sebsequent operations such as the labeling of the cans or other cases or boxes whether such subsequent operations are performed as part of an uninterrupted or interrupted process. It does not include the placing of such products or byproducts thereof in cans or other containers that are not hermetically sealed as such an operation is "processing" as distinguished from "canning" and comes within the complete exemption contained in section 13(a)(5).

Of course, the processing other than canning, referred to in the last sentence quoted above, is now like canning, in section 13(a)(5).

§ 784.143 "Necessary preparatory operations."

All necessary preparatory work performed on the named aquatic products as an integral part of a single uninterrupted canning process is subject to section 13(b)(4) (see Tobin v. Blue Channel Corp., 198 F. 2d 245, approved in Mitchell v. Myrtle Grove Packing Co., 350 U.S. 891). Such activities conducted as essential and integrated steps in the continuous and uninterrupted process of canning are clearly within the definition of "canning" as contemplated by Congress and cannot be viewed in isolation from the canning process as a whole. Exempt preparatory operations include the necessary weighing, cleaning, picking, peeling, shucking, cutting, heating, cooling, steaming, mixing, cooking, carrying, conveying, and transferring to the containers the exempt aquatic products (see Mitchell v. Stinson, 217 F. 2d 214). But the preparatory operations do not include operations specified in section 13(a)(5) pertaining to the acquisition of the exempt products from nature. Therefore, if a canner employs fishermen or others to catch, take, harvest, cultivate or farm aquatic animal and vegetable life, section 13(a)(5) and not section 13(b)(4) would apply to these particular operations.

§ 784.144 Preliminary processing by the canner.

The mere fact that operations preparatory to canning are physically separated from the main canning operations of hermetically sealing and sterilizing or pasteurizing would not be sufficient to remove them from the scope of section 13(b)(4). Where preparatory operations such as the steaming or shucking of oysters are performed in an establishment owned, operated, or controlled by a canner of seafood as part of a process consisting of continuous series of operations in which such products are hermetically sealed in containers and sterilized or pasteurized, all employees who perform any part of such series of operations on any portion of such aquatic products for canning purposes are within the scope of the term "canning."

§ 784.145 Preliminary processing by another employer as part of "canning."

If the operations of separate processors are integrated in producing canned seafood products all employees of such processors who perform any part of the described continuous series of operations to accomplish this result would be "employed in the canning of" such products. Moreover, preliminary operations performed in a separately owned processing establishment which are directed toward the particular requirements of a cannery pursuant to some definite arrangement between the operators of the two establishments would generally appear to be integrated with the cannery operations within the meaning of the above principles, so that the employees engaged in the preliminary operations in the separate establishment would be employed in "canning" within the meaning of section 13(b)(4) of the Act. Whether or not integration exists in a specific case of this general nature will depend, of course, upon all the relevant facts and circumstances in such case.

§ 784.146 "Subsequent operations."

Canning, within the meaning of the exemption, includes operations performed after hermetic sealing of the cans or other containers, such as labeling of them and placing of them in cases or boxes, which are required to place the canned product in the form in which it will be sold or shipped by the canner. This is so whether or not such operations immediately follow the actual canning operations as a part of an uninterrupted process. Storing and shipping operations performed by the employees of the cannery in connection with its canned products, during weeks in which canning operations are going on, to make room for the canned products coming off the line or to make storage room, come within the exemption. The fact that such activities relate in part to products canned during the previous weeks or seasons would not affect the application of the exemption, provided canning operations such as hermetic sealing and sterilizing, or labeling, are currently being carried on.

§ 784.147 Employees "employed in" canning.

All employees whose activities are directly and necessarily a part of the canning of the specified aquatic forms of life are within the exemption provided by section 13(b)(4). Thus, employees engaged in handling the fish or seafood, placing it into the cans, providing steam for cooking it or operating the machinery that seals the cans or the equipment that sterilizes the canned product are engaged in exempt activities. In addition, can loft workers, those engaged in removing and carrying supplies from the stock room for current use in canning operations, and employees whose duty it is to re-form cans, when canning operations are going on, for current use, are engaged in exempt activities. Similarly, the repairing, oiling, or greasing during the active season of canning machinery or equipment currently used in the actual canning operations are exempt activities. The making of repairs in the production room such as to the floor around the canning machinery or equipment would also be deemed exempt activities where the repairs are essential to the continued canning operations or to prevent interruptions in the canning operations. These examples are illustrative but not exhaustive. Employees engaged in other activities which are similarly integrated with and necessary to the actual conduct of the canning operations will also come within the exemption. Employees whose work is not directly and necessarily a part of the canning operations are not exempt. See §§ 784.106, 784.140, and 784.141.

PROCESSING, FREEZING, AND CURING

§ 784.148 General scope of processing, freezing, and curing activities.

Processing, freezing, and curing embrace a variety of operations that change the form of the "aquatic forms of animal and vegetable life." They include such operations as filleting, cutting, scaling, salting, smoking, drying, pickling, curing, freezing, extracting oil, manufacturing meal or fertilizer, drying seaweed preparatory to the manufacture of agar, drying and cleaning sponges (Feming v. Hawkeye Pearl Button Co., 113 F. 2d 52).

§ 784.149 Typical operations that may qualify for exemption.

Such operations as transporting the specified aquatic products to the processing plant; moving the products from place to place in the plant; cutting, trimming, eviscerating, peeling, shelling, and otherwise working on the products; packing the products; and moving the products from the production line to storage or to the shipping platform are typical of the operations in processing plants which are included in the exemption. Removal of waste, such as clam and oyster shells, operation of processing and packing machinery, and providing steam and brine for the processing operations (see Mitchell v. Trade Winds Inc., 289 F. 2d 278, explaining Waller v. Humphreys, 133 F. 2d 193) are also included. As for the application of the exemption to office, maintenance, warehouse, and other employees, see the discussion in § 784.106 et seq., and §§ 784.140 and 784.141.

§ 784.150 Named operations performed on previously processed aquatic products.

It will be noted that section 13(b)(4) refers to employees employed in "processing" the named aquatic commodities and not just to "first processing" as does the provision in section 13(a)(5) for such processing at sea. Accordingly, if the aquatic products, though subjected to a processing operation, are still in a perishable state, the subsequent performance of any of the enumerated operations on the still perishable products will be within the exemption no matter who the employer performing the exempt operations may be. He may be the same employer who performed the prior processing or other exempt operation, another processor, or a wholesaler, as the case may be. As noted in § 784.138(b), the Department has not questioned the applicability of the foregoing rule where the operation is performed on frozen, salted, smoked, or cured fish.

§ 784.151 Operations performed after product is rendered nonperishable.

As indicated in § 784.138, after the character of the aquatic products as taken from nature has been altered by the performance of the enumerated operations so as to render them nonperishable (e.g., drying and cleaning sponges) section 13(b)(4) provides no exemption for any subsequent operations on the preserved products, unless the subsequent operation is performed as an integrated part of the operations named in the exemption which are performed by an employer on aquatic commodities described in section 13(b)(4) after receiving them in the perishable state. In the case of an employer who is engaged in performing on perishable aquatic forms of life specified in section 13(b)(4) any operations named in that section which result in a nonperishable product, the employment of his employees in the storing, marketing, packing for shipment, or distributing of nonperishable products resulting from such operations performed by him (including products processed during previous weeks or seasons) will be considered to be an integrated part of his operations on the perishable aquatic forms of life during those workweeks when he is actively engaged in such operations. The employees employed by him in such work on the nonperishable products are, accordingly, within the exemption in such workweeks.

§ 784.152 Operations performed on byproducts.

The principles stated in the two preceding sections would also be applicable where the specified operations are performed on perishable byproducts. Any operation performed on perishable fish scraps, an unsegregated portion of which is to be canned, would come within the canning (not the processing) part of the exemption. Fish-reduction operations performed on the inedible and still perishable portions of fish resulting from processing or canning operations, to produce fish oil or meal, would come within the processing part of the exemption. Subsequent operations on the oil to fortify it would not be exempt, however, since fish oil is nonperishable in the sense that it may be held for a substantial period of time without deterioration.

MARKETING, STORING, PACKING FOR SHIPMENT, AND DISTRIBUTING

§ 784.153 General scope of named operations.

The exemption from the overtime pay requirements provided by section 13(b)(4) of the Act extends to employees "employed in the * * * marketing * * * storing, packing for shipment, or distributing of any kind of" perishable aquatic product named in the section. An employee's work must be functionally so related to the named activity as to be, in practical effect, a part of it, and the named activity must be performed with respect to the perishable aquatic commodities listed in section 13(b)(4), in order for the exemption to apply to him. The named activities include the operations customarily performed in the marketing, storing, packing for shipment, or distributing of perishable marine products. For example, an employee engaged in placing perishable marine products in boxes, cartons, crates, bags, barrels, etc., preparatory to shipment and placing the loaded containers on conveyances for delivery to customers would be employed in the "packing for shipment" of such products. Salesmen taking orders for the perishable aquatic products named in the section would be employed in the "marketing" of them. Employees of a refrigerated warehouse who perform only duties involved in placing such perishable marine products in the refrigerated space, removing them from it, and operating the refrigerating equipment, would be employed in "storing" or "distributing" such products, depending on the facts. On the other hand, employees of a public warehouse handling aquatic products which have been canned or otherwise rendered nonperishable, or handling perishable products which contain substantial amount of ingredients not named in section 13(b)(4), would not be within the exemption. Office, clerical, maintenance, and custodial employees are not exempt by reason of the fact that they are employed by employers engaged in marketing, storing, packing for shipment, or distributing seafood and other aquatic products. Such employees are exempt only when the facts of their employment establish that they are performing functions so necessary to the actual conduct of such operations by the employer that, as a practical matter, their employment is directly and necessarily a part of the operations intended to be exempted (see, for some examples, § 784.155).

§ 784.154 Relationship to other operations as affecting exemption.

Employment in marketing, storing, distributing, and packing for shipment of the aquatic commodities described in section 13(b)(4) is, as such, exempted from the overtime pay provisions of the Act. This means that the employees actually employed in such operations on the named commodities are within the exemption without regard to the intimacy or remoteness of the relationship between their work and processing operations also performed on the commodities, so long as any prior processing has not rendered the commodity nonperishable (as in the case of a canned product) and therefore removed it from the category of marine products referred to by section 13(b)(4). If the commodity has previously been rendered nonperishable, the marketing, storing, distributing, or packing for shipment of it by an employee can come within the exemption only if the activity is one performed by his employer as an integrated part of a series of the named operations which commenced with operations on the perishable marine products to which section 13(b)(4) refers. Some examples of this situation are given in §§ 784.146 and 784.151.

§ 784.155 Activities performed in wholesale establishments.

The section 13(b)(4) exemption for employment in "marketing * * * storing, or distributing" the named aquatic products or byproducts, as applied to the wholesaling of fish and seafood, affords exemption to such activities as unloading the aquatic product at the establishment, icing or refrigerating the product and storing it, placing the product into boxes, and loading the boxes on trucks or other transportation facilities for shipment to retailers or other receivers. Transportation to and from the establishment is also included (Johnson v. Johnson & Company, Inc., N.D. Ga., 47 F. Supp. 650). Office and clerical employees of a wholesaler who perform general office work such as posting to ledgers, sending bills and statements, preparing tax returns, and making up payrolls, are not exempt unless these activities can be shown to be functionally necessary, in the particular fact situation, to the actual conduct of the operations named in section 13(b)(4). Such activities as selling, taking, and putting up orders, recording sales, and taking cash are, however, included in employment in "marketing" or "distributing" within the exemption. Employees of a wholesaler engaged in the performance of any of the enumerated operations on fresh fish or fish products will be engaged in exempt work. However, any such operations which they perform on aquatic products which have been canned or otherwise rendered nonperishable are nonexempt in accordance with the principles stated in §§ 784.138 and 784.154.

APPLICATION OF SECTION 13(b)(4) IN CERTAIN ESTABLISHMENTS

§ 784.156 Establishments exclusively devoted to named operations.

As noted in § 784.106 and elsewhere in the previous discussion, the section 13(b)(4) exemption depends on employment of the employee in the operations named in that section and does not apply on an establishment basis. However, the fact that an establishment is exclusively devoted to operations specified in section 13(b)(4) is, in the absence of evidence to the contrary, an indication that the employees employed there are employed in the named operations either directly or through the performance of functions so necessary to conducting the operations that the employment should, in practical effect, be considered a part of the activity intended to be exempted. Where this is the case, it is consistent with the legislative intent to avoid segmentation and treat all employees of the establishment in the same manner (see Sen. Rep. No. 145, 87th Cong. first session, p. 33). Accordingly, where it can be demonstrated that an establishment is, during a particular workweek, devoted exclusively to the performance of the operations named in section 13(b)(4), on the forms of aquatic life there specified, any employee of the establishment who is employed there during such workweek will be considered to be employed in such operations and to come within the exemption if there are no other facts pertinent to his employment that require a particular examination of the functions which he performs in connection with the conduct of the named operations. If, however, there are any facts (for example, the employment of the same employee at the establishment or the engagement by other employees in like duties there during periods when none of the named operations are being carried on) which raise questions as to whether he is actually engaged in the exempt activities, it will be necessary to scrutinize what he is actually doing during the conduct of the operations named in section 13(b)(4) in order to determine theapplicability of the exemption to him. This is necessary because an employee who would not otherwise be within the exemption such as a carpenter doing repair work during the dead season, does not become exempt as "employed in" one of the named activities merely because the establishment begins canning or processing fish.

PART 785—HOURS WORKED

Subpart A—General Considerations

Sec.

785.1 Introductory statement.
785.2 Decisions on interpretations; use of interpretations.
785.3 Period of effectiveness of interpretations.
785.4 Application to Walsh-Healey Public Contracts Act.

Subpart B—Principles for Determination of Hours Worked

785.5 General requirements of sections 6 and 7 of the Fair Labor Standards Act.

Sec.

785.6 Definition of "employ" and partial defintion of "hours worked".
785.7 Judicial construction.
785.8 Effect of custom, contract, or agreement.
785.9 Statutory exceptions.

Subpart C—Application of Principles

785.10 Scope of subpart.

EMPLOYEES "SUFFERED OR PERMITTED" TO WORK

785.11 General.
785.12 Work performed away from the premises or job site.
785.13 Duty of management.

WAITING TIME

785.14 General.
785.15 On duty.
785.16 Off duty.
785.17 On-call time.

REST AND MEAL PERIODS

785.18 Rest.
785.19 Meal.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

785.20 General.
785.21 Less than 24-hour duty.
785.22 Duty of 24 hours or more.
785.23 Employees residing on employer's premises or working at home.

PREPARATORY AND CONCLUDING ACTIVITIES

785.24 Principles noted in Portal-to-Portal Bulletin.
785.25 Illustrative U.S. Supreme Court decisions.
785.26 Section 3(o) of the Fair Labor Standards Act.

LECTURES, MEETINGS AND TRAINING PROGRAMS

785.27 General.
785.28 Involuntary attendance.
785.29 Training directly related to employee's job.
785.30 Independent training.
785.31 Special situations.
785.32 Apprenticeship training.

TRAVELTIME

785.33 General.
785.34 Effect of section 4 of the Portal-to-Portal Act.
785.35 Home to work; ordinary situation.
785.36 Home to work in emergency situations.
785.37 Home to work on special one-day assignment in another city.
785.38 Travel that is all in the day's work.

BEST DOCUMENT AVAILABLE

Sec.
785.39 Travel away from home community.
785.40 When private automobile is used in travel away from home community.
785.41 Work performed while traveling.

ADJUSTING GRIEVANCES, MEDICAL ATTENTION, CIVIC AND CHARITABLE WORK, AND SUGGESTION SYSTEMS

785.42 Adjusting grievances.
785.43 Medical attention.
785.44 Civic and charitable work.
785.45 Suggestion systems.

Subpart D—Recording Working Time

785.46 Applicable regulations governing keeping of records.
785.47 Where records show insubstantial or insignificant periods of time.
785.48 Use of time clocks.

Subpart E—Miscellaneous Provisions

785.49 Applicable provisions of the Fair Labor Standards Act.
785.50 Section 4 of the Portal-to-Portal Act.

AUTHORITY: 52 Stat. 1060; 29 U.S.C. 201-219.

SOURCE: 26 FR 190, Jan. 11, 1961, unless otherwise noted.

Subpart A—General Considerations

§ 785.1 Introductory statement.

Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage. Section 7 of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any area or Regional Office of the Division.

[35 FR 15289, Oct. 1, 1970]

§ 785.2 Decisions on interpretations; use of interpretations.

The ultimate decisions on interpretations of the act are made by the courts. The Administrator must determine in the first instance the positions he will take in the enforcement of the Act. The regulations in this part seek to inform the public of such positions. It should thus provide a "practical guide for employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." (Skidmore v. Swift, 323 U.S. 134, 138 (1944).)

§ 785.3 Period of effectiveness of interpretations.

These interpretations will remain in effect until they are rescinded, modified or withdrawn. This will be done when and if the Administrator concludes upon reexamination, or in the light of judicial decision, that a particular interpretation, ruling or enforcement policy is incorrect or unwarranted. All other rulings, interpretations or enforcement policies inconsistent with any portion of this part are superseded by it. The Portal-to-Portal Bulletin (Part 790 of this chapter) is still in effect except insofar as it may not be consistent with any portion hereof. The applicable statutory provisions are set forth in § 785.50.

§ 785.4 Application to Walsh-Healey Public Contracts Act.

The principles set forth in this part are also followed by the Administrator of the Wage and Hour Division in determining hours worked by employees performing work subject to the provisions of the Walsh-Healey Public Contracts Act.

[35 FR 15289, Oct. 1, 1970]

BEST DOCUMENT AVAILABLE

Subpart B—Principles for Determination of Hours Worked

§ 785.5 General requirements of sections 6 and 7 of the Fair Labor Standards Act.

Section 6 requires the payment of a minimum wage by an employer to his employees who are subject to the Act. Section 7 prohibits their employment for more than a specified number of hours per week without proper overtime compensation.

[26 FR 7732, Aug. 18, 1961]

§ 785.6 Definition of "employ" and partial definition of "hours worked".

By statutory definition the term "employ" includes (section 3(g)) "to suffer or permit to work." The act, however, contains no definition of "work". Section 3(o) of the Fair Labor Standards Act contains a partial definition of "hours worked" in the form of a limited exception for clothes-changing and wash-up time.

§ 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business." (Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944)) The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". (Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

§ 785.8 Effect of custom, contract, or agreement.

The principles are applicable, even though there may be a custom, contract, or agreement not to pay for the time so spent with special statutory exceptions discussed in §§ 785.9 and 785.26.

[35 FR 15289, Oct. 1, 1970]

§ 785.9 Statutory exemptions.

(a) *The Portal-to-Portal Act.* The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar "preliminary" and "postliminary" activities performed "prior" or "subsequent" to the "workday" that are not made compensable by contract, custom, or practice. It should be noted that "preliminary" activities do not include "principal" activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the "workday". "Workday" in general, means the period between "the time on any particular workday at which such employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his "principal" activities. With respect to time spent in any "preliminary" or "postliminary" activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The "preliminary" or "postliminary" activity in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (Galvin v. National Biscuit Co., 82 F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F. 2d 963 (C.A. 2, 1949))

(b) *Section 3(o) of the Fair Labor Standards Act.* Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

[26 FR 190, Jan. 11, 1961, as amended at 30 FR 9912, Aug. 10, 1965]

Subpart C—Application of Principles

§ 785.10 Scope of subpart.

This subpart applies the principles to the problems which arise frequently.

EMPLOYEES "SUFFERED OR PERMITTED" TO WORK

§ 785.11 General.

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. (Handler v. Thrasher, 191, F. 2d 120 (C.A. 10, 1951); Republican Publishing Co. v. American Newspaper Guild, 172 F. 2d 943 (C.A. 1, 1949; Kappler v. Republic Pictures Corp., 59 F. Supp. 112 (S.D. Iowa 1945), aff'd 151 F. 2d 543 (C.A. 8, 1945); 327 U.S. 757 (1946); Hogue v. National Automotive Parts Ass'n. 87 F. Supp. 816 (E.D. Mich. 1949); Barker v. Georgia Power & Light Co., 2 W.H. Cases 486; 5 CCH Labor Cases, para. 61,095 (M.D. Ga. 1942); Steger v. Beard & Stone Electric Co., Inc., 1 W.H. Cases 593; 4 Labor Cases 60,643 (N.D. Texas, 1941))

§ 785.12 Work performed away from the premises or job site.

The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

§ 785.13 Duty of management.

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

WAITING TIME

§ 785.14 General.

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (Central Mo. Tel. Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948))

§ 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: Skidmore v. Swift, 323 U.S. 134, 137 (1944); Wright v. Carrigg, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); Mitchell v. Wigger, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); Mitchell v. Nicholson, 179 F. Supp, 292,14 W.H. Cases 487 (W.D.N.C. 1959))

§ 785.16 Off duty.

(a) *General.* Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washingtion, D.C. to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (Skidmore v. Swift, 323 U.S. 134, 137 (1944); Walling v. Dunbar Transfer & Storage, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); Gifford v. Chapman, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); Thompson v. Daugherty, 40 Supp. 279 (D. Md. 1941))

§ 785.17 On-call time.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F. 2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F. Supp. 384 (S.D. Ga. 1945))

REST AND MEAL PERIODS

§ 785.18 Rest.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (Mitchell v. Greinetz, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); Ballard v. Consolidated Steel Corp., Ltd., 61 F. Supp. 996 (S.D. Cal. 1945))

§ 785.19 Meal.

(a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (Culkin v. Glenn L. Martin, Nebraska Co., 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc., 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); Biggs v. Joshua Hendy Corp., 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); Walling v. Dunbar Transfer & Storage Co., 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); Lofton v. Seneca Coal and Coke Co., 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); Mitchell v. Tampa Cigar Co., 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); Douglass v. Hurwitz Co., 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

§ 785.20 General.

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

§ 785.21 Less than 24-hour duty.

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime. (Central Mo. Telephone Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948); Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn. 1943); Whitsitt v. Enid Ice & Fuel Co., 2 W. H. Cases 584; 6 Labor Cases para. 61,226 (W.D. Okla. 1942).)

§ 785.22 Duty of 24 hours or more.

(a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (Armour v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944); General Electric Co. v. Porter, 208 F. 2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); Bowers v. Remington Rand, 64 F. Supp. 620 (S.D. Ill, 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946) cert. denied 330 U.S. 843 (1947); Bell v. Porter, 159 F. 2d 117 (C.A. 7, 1946) cert. denied 330 U.S. 813 (1947); Bridgeman v. Ford, Bacon & Davis, 161 F. 2d 962 (C.A. 8, 1947); Rokey v. Day & Zimmerman, 157 F. 2d 736 (C.A. 8, 1946); McLaughlin v. Todd & Brown, Inc., 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); Campbell v. Jones & Laughlin, 70 F. Supp. 996 (W.D. Pa. 1947).)

(b) *Interruptions of sleep.* If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisons have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See Eustice v. Federal Cartridge Corp., 66 F. Supp. 55 (D. Minn. 1946).)

§ 785.23 Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944; Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943).)

PREPARATORY AND CONCLUDING ACTIVITIES

§ 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (Part 790 of this chapter). In dealing with this subject, § 790.8 (b) and (c) of this chapter said:

> (b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:
>
> (1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
>
> (2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.
>
> Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.
>
> (c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

§ 785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (Steiner v. Mitchell, 350 U.S. 247 (1956).) In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (Mitchell v. King Packing Co., 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

§ 785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and Part 790 of this chapter.

[30 FR 9912, Aug. 10, 1965]

LECTURES, MEETINGS AND TRAINING PROGRAMS

§ 785.27 General.

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

§ 785.28 Involuntary attendance.

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

§ 785.29 Training directly related to employee's job.

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

[30 FR 9912, Aug. 10, 1965]

§ 785.30 Independent training.

Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

§ 785.31 Special situations.

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

§ 785.32 Apprenticeship training.

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

(a) The apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and

(b) Such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

TRAVELTIME

§ 785.33 General.

The principles which apply in determining whether or not time spent in travel is working time depend upon the kind of travel involved. The subject is discussed in §§ 785.35 to 785.41, which are preceded by a brief discussion in § 785.34 of the Portal-to-Portal Act as it applies to traveltime.

§ 785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to workbench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in computing hours worked. However, ordinary travel from home to work (see § 785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See Tennessee Coal, Iron & RR. Co. v. Muscoda Local, 321 U.S. 590 (1946); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 690 (1946); Walling v. Anaconda Copper Mining Co., 66 F. Supp. 913 (D. Mont. (1946).)

§ 785.35 Home to work; ordinary situation.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

§ 785.36 Home to work in emergency situations.

There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

§ 785.37 Home to work on special one-day assignment in another city.

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, D.C., with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in § 785.36), or like travel that is all in the day's work (see § 785.38). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.

§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C. A. 10, 1944))

§ 785.39 Travel away from home community.

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

§ 785.40 When private automobile is used in travel away from home community.

If an employee is offered public transporation but requests permission to drive his car instead, the employer may count as hours worked either the time spent driving the car or the time he would have had to count as hours worked during working hours if the employee had used the public conveyance.

§ 785.41 Work performed while traveling.

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

ADJUSTING GRIEVANCES, MEDICAL ATTENTION, CIVIC AND CHARITABLE WORK, AND SUGGESTION SYSTEMS

§ 785.42 Adjusting grievances.

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked, but in the event a bona fide union is involved the counting of such time will, as a matter of enforcement policy, be left to the process of collective bargaining or to the custom or practice under the collective bargaining agreement.

§ 785.43 Medical attention.

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

§ 785.44 Civic and charitable work.

Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

§ 785.45 Suggestion systems.

Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered hours worked.

Subpart D—Recording Working Time

§ 785.46 Applicable regulations governing keeping of records.

Section 11(c) of the Act authorizes the Secretary to promulgate regulations requiring the keeping of records of hours worked, wages paid and other conditions of employment. These regulations are published in Part 516 of this chapter. Copies of the regulations may be obtained on request.

§ 785.47 Where records show insubstantial or insignificant periods of time.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See Glenn L. Martin Nebraska Co. v. Culkin, 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; Addison v. Huron Stevedoring Corp., 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that "To disregard workweeks for which less than a dollar is due will produce capricious and unfair results." Hawkins v. E. I. du Pont de Nemours & Co., 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

§ 785.48 Use of time clocks.

(a) *Differences between clock records and actual hours worked.* Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

(b) *"Rounding" practices.* It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

Subpart E—Miscellaneous Provisions

§ 785.49 Applicable provisions of the Fair Labor Standards Act.

(a) *Section 6.* Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage.

(b) *Section 7.* Section 7(a) of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours.

(c) *Section 3(g).* Section 3(g) of this act provides that: " 'Employ' includes to suffer or permit to work."

(d) *Section 3(o).* Section 3(o) of this act provides that: "Hours worked—in determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from the measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employees."

[26 FR 190, Jan. 11, 1961, as amended at 26 FR 7732, Aug. 18, 1961]

§ 785.50 Section 4 of the Portal-to-Portal Act.

Section 4 of this Act provides that:

(a) Except as provided in paragraph (b), of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Davis-Bacon Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in, on, or after May 14, 1947:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) Activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of paragraph (a) of this section which relieve an employer from liability and punishment with respect to an activity the employer shall not be so relieved if such activity is compensable by either:

(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of paragraph (b) of this section, an activity shall be considered as compensable, under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Davis-Bacon Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in paragraph (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of paragraphs (b) and (c) of this section.

PART 786—MISCELLANEOUS EXEMPTIONS

Subpart A—Carriers by Air

Sec.

786.1 Enforcement policy concerning performance of nonexempt work.

Subpart B—[Reserved]

Subpart C—Switchboard Operator Exemption

786.100 Enforcement policy concerning performance of nonexempt work.

Subpart D—Employers Subject to Part 1 of Interstate Commerce Act

Sec.

786.150 Enforcement policy concerning performance of nonexempt work.

Subpart E—Taxicab Operators

786.200 Enforcement policy concerning performance of nonexempt work.

Subpart F—Newspaper publishing

786.250 Enforcement policy.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

Subpart A—Carriers by Air

§ 786.1 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(3) of the Fair Labor Standards Act of 1938, as amended, will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employed during the workweek.

[21 FR 5056, July 7, 1956]

Subpart B—[Reserved]

Subpart C—Switchboard Operator Exemption

§ 786.100 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(a)(10) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[32 FR 15426, Nov. 4, 1967]

Subpart D—Employers Subject to Part 1 of Interstate Commerce Act

§ 786.150 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(2) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[13 FR 1377, Mar. 17, 1948]

Subpart E—Taxicab Operators

§ 786.200 Enforcement policy concerning performance of nonexempt work.

The Division has taken the position that the exemption provided by section 13(b)(17) of the Fair Labor Standards Act will be deemed applicable even though some nonexempt work (that is, work of a nature other than that which characterizes the exemption) is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. For enforcement purposes, the amount of nonexempt work will be considered substantial if it occupies more than 20 percent of the time worked by the employee during the workweek.

[32 FR 15426, Nov. 4, 1967]

Subpart F—Newspaper Publishing

§ 786.250 Enforcement policy.

The exemption provided by paragraph 13(a)(8) of the Fair Labor Standards Act of 1938 applies to "any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto." For the purpose of enforcement, it is the Divisions' position that such an employee is within the exemption even though he is also engaged in job printing activities. if less than 50 percent of the employee's worktime during the workweek is spent in job printing work, some of which is subject to the Act. If none of the job printing activities are within the general coverage of the Act, the exemption applies even if the job printing activities equal or exceed 50 percent of the employee's worktime. However, this exemption is not applicable if the employee spends 50 percent or more of his worktime in a workweek on job printing, any portion of which is within the general coverage of the Act on an individual or enterprise basis.

[32 FR 15426, Nov. 4, 1967]

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

Sec.

788.1 Statutory provisions.
788.2 Matters not discussed in this part.
788.3 Purpose of this part.
788.4 Significance of official interpretations.
788.5 Reliance on official interpretations.
788.6 Scope of the section 13(a)(13) exemption.
788.7 "Planting or tending trees."
788.8 "Cruising, surveying, or felling timber."
788.9 "Preparing * * * logs."
788.10 "Preparing * * * other forestry products."
788.11 "Transporting [such] products to the mill, processing plant, railroad, or other transportation terminal."
788.12 Limitation of exemption to specific operations in which "number of employees * * * does not exceed eight."
788.13 Counting the eight employees.
788.14 Number employed in other than specified operations.
788.15 Multiple crews.

Sec.
788.16 Employment relationship.
788.17 Employees employed in both exempt and nonexempt work.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

SOURCE: 34 FR 15794, Oct. 14, 1969, unless otherwise noted.

§ 788.1 Statutory provisions.

Section 13(a)(13) of the Fair Labor Standards Act of 1938, as amended, provides an exemption from the minimum wage and overtime requirements of the Act, as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight.

This exemption, formerly section 13(a)(15) of the Act, was amended by the Fair Labor Standards Amendments of 1966 (80 Stat. 830) to change the number of employees limitation from 12 to eight, and to redesignate it as section 13(a)(13).

§ 788.2 Matters not discussed in this part.

The exemption in section 13(a)(13) of the Act need not be considered unless the employee is "engaged in commerce or the production of goods for commerce" or is employed in an "enterprise engaged in commerce or in the production of goods for commerce," as those words are defined in the Act, so as to come within the general scope of sections 6 and 7. The principles of coverage are discussed in Part 776 of this chapter and the discussion will not be repeated in this part. Neither does this part discuss the exemptions provided in section 13(a)(6) and 13(b)(12), or section 3(f) which includes in the definition of agriculture forestry or lumbering operations performed by a farmer or on a farm as an incident to or in conjunction with certain farming operations. (See Part 780 of this chapter.)

§ 788.3 Purpose of this part.

The purpose of this part is to make available in one place the views of the Department of Labor with respect to the application and meaning of the provisions of section 13(a)(13) of the Act which will provide "a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it" (Skidmore v. Swift & Co., 324 U.S. 134).

§ 788.4 Significance of official interpretations.

The interpretations contained in this part indicate, with respect to section 13(a)(13) of the Act which refers to small forestry or lumbering operations, the construction of the law which the Secretary of Labor and the Administrator believes to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoratative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect.

§ 788.5 Reliance on offical interpretations.

Under section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259), official interpretation issued under the Fair Labor Standards Act of 1938 may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations of the law contained in this part are official interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act so long as they remain effective and are not modified, rescinded, or determined by judicial authority to be incorrect. However, the failure to discuss a particular problem in this part or in the interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy.

§ 788.6 Scope of the section 13(a)(13) exemption.

Employees will not be held exempt under section 13(a)(13) unless they are clearly shown to come within its terms. (Wirtz v. F. M. Sloan Co., 411 F. 2d 56 (C.A. 3), 18 WH Cases 878; Gatlin Lumber Co. v. Mitchell, 287 F. 2d 76 (C.A. 5) cert. denied, 366 U.S. 963.) By its terms, the exemption is limited to those employed in the named operations by an employer who employs not more than eight employees therein. The named operations are described in terms of ordinary speech and mean what they mean in ordinary intercourse in this context. These operations include the incidental activities normally performed by persons employed in them, but do not include mill operations.

§ 788.7 "Planting or tending trees."

Employees employed in "planting or tending trees" include those engaged in weeding, preparing firebreaks, removing "seeding, planting seedlings, pruning, rot or rusts, spraying, and similar operations when the object is to bring about, protect, or foster the growth of trees." "Tending trees" would also include watching the timberland to guard against thefts and fire (Gatlin Lumber Co. v. Mitchell, 287 F. 2d 76, cert. den. 366 U.S. 963).

§ 788.8 "Cruising, surveying, or felling timber."

Employees engaged in "cruising * * * timber" include all those members of a field crew whose purpose is to estimate and report on the volume of marketable timber. Employees engaged in "surveying * * * timber" include the customary members of a crew accomplishing that function such as the chairmen, the transit men, the rodmen, and the axmen who clear the ground of brush or trees in order that the transit men may obtain a clear sight. Similarly, the usual members of a crew which go to the woods for the purpose of felling timber and preparing and transporting logs are engaged in operations described in the exemption. Typically included, when members of such a crew, are fellers, limbers, skidders, buckers, loaders, swampers, scalers, and log truck drivers.

§ 788.9 "Preparing * * * logs."

Preparing logs includes, where appropriate, removing the limbs and top, cutting them into lengths, removing the bark, and splitting or facing them when done at the felling site, but does not include such operations when done at a mill. Employees engaged in sawmill, tie mill, and other operations in connection with the processing of logs, such as the production of lumber, are not exempt.

§ 788.10 "Preparing * * * other forestry products."

As used in the exemption, "other forestry products" mean plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns and Christmas trees, roots, stems, leaves, Spanish moss, wild fruit, and brush. Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations which change the natural physical or chemical condition of the products or which amount to extracting as distinguished from gathering, such as shelling nuts, or mashing berries to obtain juices.

§ 788.11 "Transporting [such] products to the mill, processing plant, railroad, or other transportation terminal."

The transportation or movement of logs or other forestry products to a "mill processing plant, railroad, or other transportation terminal" is among the described operations. Loading and unloading, when performed by employees employed in the named operations, are included as exempt operations. Loading logs or other forestry products onto railroad cars or other transportation facilities for further shipment if performed as part of the exempt transportation will be considered a step in the exempt transportation (Woods Lumber Co. v. Tobin, 199 F. 2d 455 (C.A.5)). However, any other loading, transportation, or other activities performed in connection with the logs or other forestry products after they have been unloaded at one of the described destinations is not exempt. "Other transportation terminal" refers to any place where there are established facilities or equipment for the shipment or transportation of logs or other forestry products. Motor carrier yards, docks, wharves, or similar facilities are examples of other transportation terminals, but the place where logs are picked up by contract motor carriers or haulers at the site of the woods operations for transportation to the mill, processing plant, or railroad is not such a terminal.

§ 788.12 Limitation of exemption to specific operations in which "number of employees * * * does not exceed eight."

Regardless of his duties, no employee is exempt under section 13(a)(13) unless "the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight."

§ 788.13 Counting the eight employees.

The determination of the number of employees employed in the named operations is to be made on an occupational and a workweek basis. Thus the exemption will be available in one workweek when eight or less employees are employed in the exempt operations and not in another workweek when more than that number are so employed. For a discussion of the term "workweek" see Part 778 of this chapter. The exemption will not be defeated, however, if one or more of the eight employees so engaged is replaced during the workweek, for example, by reason of illness. But if additional employees are employed during the workweek in the named operations, even if they work on a different shift, the exemption would no longer be available if the total number exceed eight. Similarly, all of an employer's employees employed in any workweek in the named operations must be counted in the eight regardless of where the work is performed or how it is divided. Thus if an employer employs four employees in felling timber and preparing logs at one location and five at another location in those operations, the exemption would not be available. Similarly, if he employs six employees in such operations and three other employees in transportation work as discussed in § 788.11, the exemption could not apply. Under such circumstances he would be employing more than eight employees in the named operations. The fact that some of these employees may not be engaged in commerce or the production of goods for commerce or may be engaged in other exempt operations will not affect these conclusions (Woods Lumber Co. v. Tobin, 199 F. 2d 455 (C.A. 5)). Except for replacements, therefore, all of an employer's employees employed in the named operations in a workweek must be counted, regardless of where they perform their work or in which of the named operations or combinations of such operations they are employed. The length of time an employee is employed in the named operations during a workweek is also immaterial for the purpose of applying the numerical limitation. Thus, even if an employee would not himself be exempt because he is engaged substantially in nonexempt work (see § 788.17), nevertheless, if, as a regular part of his duties, he is also engaged in the operations named in the exemption, he must be counted in determining whether the eight employee limitation is satisfied.

§ 788.14 Number employed in other than specified operations.

The exemption is available to an employer, however, even if he has a total of nine or more employees, if only eight of them or less are employed in the named operations. Thus, if such an employer employs only eight employees in the named operations and others in operations not named in the exemption, such as sawmill operations, the exemption is not defeated because of the fact that he employs more than eight employees altogether. It will not apply, however, to those engaged in the operations not named in the exemption.

§ 788.15 Multiple crews.

In many cases an employer who operates a sawmill or concentration yard will be supplied with logs or other forestry products by several crews of persons who are engaged in the named operations. Frequently some or all of such crews, separately considered, do not employ more than eight persons but the total number of such employees is in excess of eight. Whether the exemption will apply to the members of the individual crews which do not exceed eight will depend on whether they are employees of the sawmill or concentration yard to which the logs or other forestry products are delivered or whether each such crew is a truly independently owned and operated business. If the number of employees in such a truly independently owned and operated business does not exceed eight, the exemption will apply. On the other hand, the Secretary and the Administrator will assume that the courts will be reluctant to approve as bona fide a plan by which an employer of a large number of woods employees splits his employees into several allegedly "independent businesses" in order to take advantage of the exemption.

§ 788.16 Employment relationship.

(a) The Supreme Court has made it clear that there is no single rule or test for determining whether an individual is an employee or an independent contractor, but that the "total situation controls" (see Rutherford Food Corp. v. McComb, 331 United States 722; United States v. Silk, 331 United States 704; Harrison v. Greyvan Lines, 331 United States 704; Bartels v. Birmingham, 332 United States 126). In general an employee, as distinguished from a person who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the business which he serves. As an aid in assessing the total situation the Court mentioned some of the characteristics of the two classifications which should be considered. Among these are: The extent to which the services rendered are an integral part of the principal's business, the permanency of the relationship, the opportunities for profit or loss, the initiative judgment or foresight exercised by the one who performs the services, the amount of investment, and the degree of control which the principal has in the situation. The Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied.

(b) At least in one situation it is possible to be specific: (1) Where the sawmill or concentration yard to which the products are delivered owns the land or the appropriation rights to the timber or other forestry products; (2) the crew boss has no very substantial investment in tools or machinery used; and (3) the crew does not transfer its relationship as a unit from one sawmill or concentration yard to another, the crew boss and the employees working under him will be considered employees of the sawmill or concentration yard. Other situations, where one or more of these three factors is not present, will be considered as they arise on the basis of the criteria mentioned in paragraph (a) of this section. Where all of these three criteria are present, however, it will make no difference if the crew boss receives the entire compensation for the production from the sawmill or concentration yard and distributes it in any way he chooses to the crew members. Similarly, it will make no difference if the hiring, firing, and supervising of the crew members is left in the hands of the crew boss. (See Tobin v. LaDuke, 190 F. 2d 977 (C.A. 9); Tobin v. Anthony-Williams Mfg. Co., 196 F. 2d 547 (C.A. 8).)

§ 788.17 Employees employed in both exempt and nonexempt work.

The exemption for an employee employed in exempt work will be defeated in any workweek in which he performs a substantial amount of nonexempt work. For enforcement purposes nonexempt work will be considered substantial in amount if more than 20 percent of the time worked by the employee in a given workweek is devoted to such work. Where two types of work cannot be segregated, however, so as to permit separate measurement of the time spent in each, the employee will not be exempt.

PART 789—GENERAL STATEMENT ON THE PROVISIONS OF SECTION 12(a) AND SECTION 15(a)(1) OF THE FAIR LABOR STANDARDS ACT OF 1938, RELATING TO WRITTEN ASSURANCES

Sec.
789.0 Introductory statement.
789.1 Statutory provisions and legislative history.
789.2 "* * * in reliance on written assurance from the producer * * *"
789.3 "* * * goods were produced in compliance with" * * * the requirements referred to.
789.4 Scope and content of assurances of compliance.
789.5 "* * * acquired * * * in good faith * * * for value without notice * * *".

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

SOURCE: 15 FR 5047, Aug. 5, 1950, unless otherwise noted.

§ 789.0 Introductory statement.

(a) Section 12(a) and section 15(a)(1) of the Fair Labor Standards Act of 1938 [1] (hereinafter referred to as the act) contain certain prohibitions against putting into interstate or foreign commerce any goods ineligible for shipment (commonly called "hot goods"), in the production of which the child-labor or wage-hour standards of the act were not observed. These sections were amended by the Fair Labor Standards Amendments of 1949 [2] to provide, among other things, protection against these "hot goods" prohibitions with respect to purchasers "who acquired such goods for value without notice of such violation" if they did so "in good faith in reliance on" a specified "written assurance."

(b) These amendments to the act relating to purchasers in good faith and written assurances are for the protection of purchasers. The act does not provide that a purchaser must secure such an assurance or that a supplier must give it. The amendments confer no express authority for the Department of Labor to require the use of these assurances or to prescribe their form or content. Whether any particular written assurance affords the statutory protection to a purchaser who acquires his goods in good faith and for value without notice of an applicable violation, is left for determination by the courts. Opinions issued by the Department of Labor on this question are advisory only and represent simply the Department's best judgment as to what the courts may hold.

(c) The interpretations contained in this general statement are confined to the statutory protection accorded these purchasers in section 12(a) and section 15(a)(1) of the Act. These interpretations, with respect to this protection of purchasers, indicate the construction of the law which the Secretary of Labor and the Administrator of the Wage and Hour Division [3] believe to be correct and which will guide them in the performance of their administrative duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon re-examination of an interpretation, that it is incorrect.

[15 FR 5047, Aug. 5, 1950, as amended at 21 FR 1450, Mar. 6, 1956]

§ 789.1 Statutory provisions and legislative history.

Section 12(a) of the Act provides, in part that no producer, manufacturer or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within 30 days prior to the removal of such goods therefrom, any oppressive child labor has been employed. Section 12(a) then provides an exception from this prohibition in the following language:

---

[1] Pub. No. 718, 75th Cong., 3d sess. (52 Stat. 1060), as amended by the act of June 26, 1940 (Pub. Res. No. 88, 76th Cong., 3d sess., 54 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 1095), effective July 16, 1946; by the Portal-to-Portal Act of 1947, approved May 14, 1947 (61 Stat. 84); by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (Pub. L. 393, 81st Cong., 1st sess., 63 Stat. 910); by Reorganization Plan No. 6 of 1950 (15 FR 3174), effective May 24, 1950; and by the Fair Labor Standards Amendments of 1955, approved August 12, 1955 (Pub. L. 381, 84th Cong., 1st sess., C. 867, 69 Stat. 711).

[2] Pub. L. 393, 81st Cong., 1st sess. 963 Stat. 910.

[3] The functions of the Secretary and the Administrator under the act are delineated in 13 FR 2195, 12 FR 6971, and 15 FR 3290.

> *Provided*, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection * * *.

Section 15(a)(1) provides, in part, that it shall be unlawful for any person to transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or 7 of the Act or any regulation or order of the Administrator issued under section 14. Section 15(a)(1) also provides the following exception with respect to this "hot goods" restriction:

> * * * any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

The most important portion of the legislative history of those provisions in sections 12(a) and 15(a)(1) which relate to the protection of purchasers is found in the following discussion of the amendment to section 15(a)(1), contained in the Statement of the Managers on the part of the House appended to the Conference Report on the Fair Labor Standards Amendments of 1949:[4]

> This provision protects an innocent purchaser from an unwitting violation and also protects him from having goods which he has purchased in good faith ordered to be withheld from shipment in commerce by a "hot goods" injunction. An affirmative duty is imposed upon him to assure himself that *the goods in question were produced* in compliance with the act, and he must have secured written assurance *to that effect* from the producer of the goods. The requirement that he must have made the purchase in good faith is comparable to similar requirements imposed on purchasers in other fields of law, and is to be subjected to the test of what a reasonable, prudent man, acting with due diligence, would have done in the circumstances. (Emphasis supplied.)

This discussion would appear to be generally applicable also to the similar provisions of the Act contained in section 12(a).

§ 789.2 " * * * in reliance on written assurance from the producer * * *."

In order for a purchaser to be protected under these provisions of the Act, he must acquire the goods "in reliance on written assurance * * *." The written assurance specified in section 15(a)(1) is one from the "producer" and in section 12(a) it is one from the "producer, manufacturer or dealer."

Since the acquisition of the goods by the purchaser must be "in reliance" upon such written assurance it is obvious that the Act contemplates a written assurance given to the purchaser as a part of the transaction by which the goods are acquired and on which he can rely at the time of their acquisition. Thus, where the purchaser does not receive a written assurance at the time he acquires particular goods, he cannot be said to have acquired the goods "in reliance on" the specified written assurance merely because the producer later furnishes an assurance that all goods which the purchaser has previously acquired from him were produced in compliance with the Fair Labor Standards Act.

The assurances described in the Act are assurances in writing "from" the producer or "from" the producer, manufacturer, or dealer, as the case may be. It is therefore clear that the following procedures will not amount to "written assurance from the producer" within the meaning of the Act:

(a) The purchaser stamps his purchase order with the statement that the order is valid only for goods produced in compliance with the requirements of the Fair Labor Standards Act. No written statement concerning the production of the goods is made to the purchaser by the producer. The producer ships the goods which the purchaser has ordered.

---

[4] H. Rept. No. 1453, 81st Cong. 1st sess., p. 31.

(b) The purchaser stamps the above statement on his purchase order and in addition notifies the producer that shipment of the goods so ordered will be construed by the purchaser as a guarantee by the producer that the goods were produced in compliance with the Act. The producer ships the goods to the purchaser.

In neither of these situations can the purchase order be deemed to contain a written assurance from the producer to the purchaser. A statement concerning the circumstances under which the order will be valid is sent to the producer, but no written instrument at all is given the purchaser by the producer. Although, in these situations, the shipment of the goods by the producer may establish a contractual relationship between the parties, the conditions of the statute are not satisfied because there is in neither situation any written assurance from the producer to the purchaser that the goods were produced in compliance with applicable provisions of the Act referred to in sections 12(a) and 15(a)(1).

§ 789.3 "* * * goods were produced in compliance with" * * * the requirements referred to.

It is apparent from the language of the statute and the statement appended to the Conference Report[5] that the written assurance referred to is one with respect to specific goods in being, assuring the purchaser that the "goods in question were produced in compliance" with the requirements referred to in sections 12(a) and 15(a)(1). A written statement made prior to production of the particular goods is not the type of assurance contemplated by the statute.

A so-called "general and continuing" assurance or "blanket guarantee" stating, for instance, that all goods to be shipped to the purchaser during a twelve-month period following a certain date "will be or were produced" in compliance with applicable provisions of the Act would not afford the purchaser the statutory protection with respect to any production of such goods after the assurance is given. This type of assurance attempts to assure the purchaser concerning the future production of goods. With respect to any production of goods after the assurance is given, this "general and continuing" assurance would, at most, be an assurance that the goods will be produced in compliance with the Act.

The definitions of the terms "goods" and "produced" in sections 3(i) and 3(j) of the Act[6] respectively, should be considered in interpreting the requirement that the written assurance must relate to goods which were produced in compliance with applicable provisions of the Act. These definitions make it apparent, for instance that the raw materials from which a machine has been made retain their identity as "goods" even though these raw materials have been converted into an entirely different finished product in which the raw materials are merely a part.

Since "goods," as defined in the Act, "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturing, or processor thereof," the "hot goods" restrictions of section 12(a) and section 15(a)(1) do not apply to such ultimate consumers. There appears to be no need, therefore, for such consumers to secure these written assurances from their suppliers.

---

[5] H. Rept. No. 1453, 81st Cong., 1st sess., p. 31.

[6] Section 3(i) defines "goods" to mean "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Section 3(j) defines "produced" to mean "produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

§ 789.4 Scope and content of assurances of compliance.

A question frequently asked is whether a single written assurance of compliance will suffice for purposes both of section 12(a), relating to child labor, and section 15(a)(1), relating to wage and hour standards. A single assurance would appear to be sufficient, provided it is specific enough to meet all the conditions of the two sections. Although it is possible that the courts might find assurances referring generally to compliance "with the requirements of the Act" adequate for all purposes, the safer course to pursue would be to phrase the assurance in terms of compliance with the specific sections of the Act whose violation would bar the goods from interstate or foreign commerce.

The language of the statute gives support to this view. It will be noted that the written assurance referred to in section 15(a)(1) is described as one of "compliance with the requirements of the Act * * *," whereas the written assurance referred to in section 12(a) is described as one of "compliance with this section." In view of the differences in wording of the two sections, a court might conclude that a general assurance of compliance with the Act is not sufficient to include a specific assurance of compliance with section 12, on the theory that if Congress had intended an assurance of compliance with the Act to be sufficient under the child-labor provisions, there would have been no reason for the use of the more specific language which it placed in section 12. Also, it is possible that a court might conclude that Congress intended, under section 15(a)(1), that the assurance should refer specifically to the particular sections of the Act mentioned therein, since unless there is some violation of one of those sections in the production of goods, a subsequent purchaser is not prohibited from putting them in commerce.

There is no prescribed form or language that must be followed in order for the written assurance of compliance to afford the desired protection. However, in view of the considerations mentioned above, the following is suggested as a guide for the type of language which would appear to provide the maximum degreee of certainty that a purchaser who acquired the goods in good faith in reliance on the written assurance would receive the protection intended by the amendments:

> We hereby certify that these goods were produced in compliance with all applicable requirements of sections 6, 7, and 12 of the Fair Labor Standards Act, as amended, and of regulations and orders of the United States Department of Labor issued under section 14 thereof:

The question has also arisen as to what method should be used to give a purchaser a proper written assurance which would adequately identify the particular goods to which such assurance relates. Although other means of giving proper written assurances may be found to be more practical and convenient, it appears that one simple and feasible method of giving such assurance is for the producer to stamp or print the assurance on the invoice which covers the particular goods and which is given to the purchaser as a part of the transaction whereby the goods are acquired.

§ 789.5 "* * * acquired * * * in good faith * * * for value without notice * * *."

Section 12(a) and section 15(a)(1) of the Act provide that a purchaser must acquire the goods in good faith in reliance on the specified written assurance in order to be accorded the statutory protection.

The legislative history of the amendments indicates that a purchaser's good faith is not to be determined merely from the actual state of his mind but that good faith also depends upon an objective test—that of what a "reasonable, prudent man, acting with due diligence, would have done in the circumstances." This good faith requirement is, in the words of the House Managers, "comparable to similar requirements imposed on purchasers in other fields of law." The final determination of what will amount to good faith can be made only upon the basis of the pertinent facts in each situation.

It is clear, however, that good faith as used in the Act, not only requires honesty of intention but also that a purchaser must not know, have reason to know, or have knowledge of circumstances which ought to put him on inquiry that the goods in question were produced in violation of any of the provisions of the Act referred to in sections 12(a) and 15(a)(1).

These good faith provisions are reinforced by the requirement in sections 12(a) and 15(a)(1) that the purchaser must also acquire his goods "for value without notice" of an applicable violation of the Act.

To illustrate the application of the above principles, let us assume that a purchaser of goods for value acquires them in reliance upon a written assurance from the producer, manufacturer, or dealer that the particular goods were produced in compliance with all applicable requirements of the Act, and that the form and content of the assurance is sufficient to meet the conditions of sections 12 and 15(a)(1) of the Act. If a reasonable, prudent man in the purchaser's position, acting with the diligence, would have no reason to question the truth of the assurance that the applicable requirements has been complied with, the purchaser's reliance on such written assurance would be considered to be in good faith and without notice of any violation, and the purchaser would be protected in the event that violations of the child-labor or the wage-hour standards of the Act had actually occurred in the production of such goods by the vendor or by prior producers of the goods. In such circumstances, the purchaser's protection would not be contingent on his securing separate written assurances from the prior producers or on his assuring himself that his vendor had secured specific guarantees from them with respect to compliance.

PART 790—GENERAL STATEMENT AS TO THE EFFECT OF THE PORTAL-TO-PORTAL ACT OF 1947 ON THE FAIR LABOR STANDARDS ACT OF 1938

GENERAL

Sec.
790.1 Introductory statement.
790.2 Interrelationship of the two acts.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES ON OR AFTER MAY 14, 1947

790.3 Provisions of the statute.
790.4 Liability of employer; effect of contract, custom, or practice.
790.5 Effect of Portal-to-Portal Act on determination of hours worked.
790.6 Periods within the "workday" unaffected.
790.7 "Preliminary" and "postliminary" activities.
790.8 "Principal" activities.
790.9 "Compensable * * * by an express provision of a written or nonwritten contract."
790.10 "Compensable * * * by a custom or practice."
790.11 Contract, custom or practice in effect "at the time of such activity."
790.12 "Portion of the day."

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

790.13 General nature of defense.
790.14 "In conformity with."
790.15 "Good faith."
790.16 "In reliance on."
790.17 "Administrative regulation, order, ruling, approval, or interpretation."
790.18 "Administrative practice or enforcement policy."
790.19 "Agency of the United States."

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

790.20 Right of employees to sue; restrictions on representative actions.
790.21 Time for bringing employee suits.
790.22 Discretion of court as to assessment of liquidated damages.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 et seq.

SOURCE: 12 FR 7655, Nov. 18, 1947, unless otherwise noted.

GENERAL

§ 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 4, 1947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,[2] the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these acts.

For the sake of brevity, this act is referred to in the following discussion as the Portal Act.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he makes these conclusions known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administration believes to be correct[5] and which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is in-

---

[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes (61 Stat. 84; 29 U.S.C., Sup., 251 et seq.).

[2] 52 Stat. 1060, as amended; 29 U.S.C. 201 et seq. In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this act, see footnote 17.

[3] Sections 790.23 through 790.29 in the prior edition of this Part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

[4] See Skidmore v. Swift & Co., 323 U.S. 134; Kirschbaum Co. v. Walling, 316 U.S. 517; Portal-to-Portal Act, sec. 10.

[5] The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

BEST DOCUMENT AVAILABLE

correct. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in[6] enforcement of the law will seek to apply it. As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained in this part.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy.[9] The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act"[11] that it "protects the legitimate claims" under that act,[12] and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act."[13] It would therefore appear

---

[6] Skidmore v. Swift & Co., 323 U.S. 134. See also Roland Electrical Co. v. Walling, 326 U.S. 657; United States v. American Trucking Assn., 310 U.S. 534; Overnight Motor Transp. Co. v. Missel, 316 U.S. 572.

[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provision of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, "employer," "employee," and "wage", when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12. Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 93 Cong. Rec. 2098; colloquy between Senators Donnell and Ferguson, 93 Cong. Rec. 2127; statement of Representative Gwynne, 93 Cong. Rec. 1557.

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in statement of Senator Donnell, 93 Cong. Rec. 2177; see also statement of Senator Morse, 93 Cong. Rec. 2274; statement of Representative Walter, 93 Cong. Rec. 4389.

[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 93 Cong. Rec. 4390; statement of Senator Wiley, 93 Cong. Rec. 4269, 4270; statement of Representative Gwynne, 93 Cong. Rec. 1572; statements of Senator Donnell, 93 Cong. Rec. 2133-2135, 2176-2178; statement of Representative Robsion, 93 Cong. Rec. 1499; Message of the President to Congress, May 14, 1947 on approval of the act (93 Cong. Rec. 5281).

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 and 4371. See also statement of Senator Cooper, 93 Cong. Rec. 2295; statement of Representative Robsion, 93 Cong. Rec. 1499, 1500.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4391. See also statement of Representative Keating, 93 Cong. Rec. 1512.

[13] Statement of Senator Cooper, 93 Cong. Rec. 2300; see also statements of Senator Donnell, 93 Cong. Rec. 2361, 2362, 2364; statements of Representatives Walter and Robsion, 93 Cong. Rec. 1496, 1498.

BEST DOCUMENT AVAILABLE

that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation [14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption. [15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is affected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of "hot" goods produced by employees not paid in accordance with the act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in this part in connection with the discussion of specific provisions of the 1947 act.

PROVISIONS RELATING TO CERTAIN ACTIVITIES ENGAGED IN BY EMPLOYEES ON OR AFTER MAY 14, 1947

§ 790.3 Provisions of the statute.

Section 4 of the Portal Act, which relates to so-called "portal-to-portal" activities engaged in by employees on or after May 14, 1947, provides as follows:

> (a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this act:
>
> (1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) Activities which are preliminary to or postliminary to said principal activity or activities
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.
>
> (b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either:
>
> (1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.
>
> (c) For the purpose of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.
>
> (d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

---

[14] Roland Electrical Co. v. Walling, 326 U.S. 657; United States v. Rosenwasser, 323 U.S. 360; Brooklyn Savings Bank v. O'Neil, 324 U.S. 697.

[15] See Phillips Co. v. Walling, 324 U.S. 490; Walling v. General Industries Co., 330 U.S. 545.

BEST DOCUMENT AVAILABLE

§ 790.4 Liability of employer; effect of contract, custom, or practice.

(a) Section 4 of the Portal Act, quoted above, applies to situations where an employee, on or after May 14, 1974, has engaged in activities of the kind described in this section and has not been paid for or on account of these activities in accordance with the statutory standards established by the Fair Labor Standards Act.[16] Where, in these circumstances such activities are not compensable by contract, custom, or practice as described in section 4, this section relieves the employer from certain liabilities or punishments to which he might otherwise be subject under the provisions of the Fair Labor Standards Act.[17] The primary Congressional objectives in enacting section 4 of the Portal Act, as disclosed by the statutory language and legislative history were: (1) To minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the Fair Labor Standards Act of such preliminary or postliminary activities should continue to be tested solely by existing criteria[18] for determining compensable worktime, independently of contract, custom, or pratice;[19] and (2) to leave in effect, with respect to the workday proper, the interpretations by the courts and the Administrator of the requirements of the Fair Labor Standards Act with regard to the compensability of activities and time to be included in computing hours worked.[20]

(b) Under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefor if, and only if, such activities meet the following three tests:

(1) They constitute "walking, riding, or traveling" of the kind described in the statute, or other activities "preliminary" or "postliminary" to the "principal activity or activities" which the employee is employed to perform; and

(2) They take place before or after the performance of all the employee's "principal activities" in the workday; and

(3) They are not compensable, during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

---

[16] The Fair Labor Standards Act, as amended, requires the payment of the applicable minimum wage for all hours worked and overtime compensation for all hours in excess of 40 in a workweek at a rate not less than one and one-half times the employees regular rate of pay, unless a specific exemption applies.

[17] The failure of an employer to compensate employees subject to the Fair Labor Standards Act in accordance with its minimum wage and overtime requirements makes him liable to them for the amount of their unpaid minimum wages and unpaid overtime compensation together with an additional equal amount (subject to section 11 of the Portal-to-Portal Act, discussed below in § 790.22) as liquidated damages (section 16(b) of the act); and, if his act or omission is willful, subjects him to criminal penalties (section 16(a) of the act). Civil actions for injunction can be brought by the Administrator (sections 11(a) and 17 of the act).

[18] Employees subject to the minimum and overtime wage provisions of the Fair Labor Standards Act have been held to be entitled to compensation in accordance with the statutory standards, regardless of contrary custom or contract, for all time spent during the workweek in "physical or mental exertion (whether burdensome or not), controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (Tennessee Coal Iron & R.R. Co. v. Muscoda Local, 321 U.S. 590, 598), as well as for all time spent in active or inactive duties which such employees are engaged to perform (Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323, U.S. 134, 136-137).

[19] Portal Act, section 1: Senate Report, pp. 41, 42, 46-49; Conference Report, pp. 12, 13; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270; statements of Senator Donnell, 93 Cong. Rec. 2089, 2121, 2122, 2181, 2182, 2362, 2363; statements of Senator Cooper, 93 Cong. Rec. 2292-2300.

[20] Senate Report, pp. 46-49; Conference Report, pp. 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362; statements of Senator Cooper, 93 Cong. Rec. 2294, 2296, 2297, 2299, 2300; statement of Representative Gwynne, 93 Cong. Rec. 4388; statements of Senator Wiley, 93 Cong. Rec. 2084, 4269-4270.

BEST DOCUMENT AVAILABLE

(c) It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that "the employer shall not be so relieved" if such activities are so compensable;[21] it does not matter in such a situation that they are so-called "portal-to-portal" activities.[22]

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the Fair Labor Standards Act is not protected from liability or punishment in either of the following situations.

(1) Where, at the time such activities are performed there is a contract, whether written or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for;[23] or

(2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.[24]

In applying these principles, it should be kept in mind that under the provisions of section 4(c) of the Portal-to-Portal Act, "preliminary" or "postliminary" activities which take place outside the workday "before the morning whistle" or "after the evening whistle" are, for purposes of the statute, not to be considered compensable by a contract, custom or practice if such contract, custom or practice makes them compensable only during some other portion of the day.[25]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

> . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activi-

---

[21] Section 4(b) of the act (quoted in § 790.3).

[22] Conference Report, pp. 12, 13; colloquy between Senators Donnell and Hakes, 93 Cong. Rec. 2181-2182; colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298, cf. colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[23] Statements of Senator Donnell, 93 Cong. Rec. 2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298, 2299.

[24] Statements of Senator Donnell, 93 Cong. Rec. 2181, 2182.

[25] Conference Report, pp. 12, 13. See also § 790.12.

[26] The full text of section 4 of the act is set forth in § 790.3.

[27] See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

BEST DOCUMENT AVAILABLE

ty is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours

---

[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

[32] Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296-2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297-2298. See also Senate Report, p. 48.

[33] See §§ 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

BEST DOCUMENT AVAILABLE

worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday.[41]

---

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in Part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7-790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4, 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the

Continued

BEST DOCUMENT AVAILABLE

And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which Section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwide travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous per-

---

conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in Part 785 of this chapter.

BEST DOCUMENT AVAILABLE

formance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

---

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61]

---

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See Skidmore v. Swift & Co., 323 U.S. 134, 7 WHR 1165.

[53] See §§ 790.4 through 790.6 of this bulletin and Part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain "preliminary" and "postliminary" activities are expresely mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. Edward F. Allison Co., Inc. v. Commissioner of Internal Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. Armour & Co. v. Wantock, 323 U.S. 126, 132-134; Skidmore v. Swift & Co., 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

§ 790.9 "Compensable * * * by an express provision of a written or nonwritten contract."

(a) Where an employee engages in a "preliminary" or "postliminary" activity of the kind described in section 4(a) of the Portal Act and this activity is "compensable * * * by an express provision of a written or nonwritten contract" applicable to the employment, section 4 does not operate to relieve the employer of liability or punishment under the Fair Labor Standards Act with respect to such activity,[68] and does not relieve the employer of any obligation he would otherwise have under that act to include time spent in such activity in computing hours worked.[69]

---

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

[68] See § 790.4.

(b) The word "compensable," is used in subsections (b), (c), and (d) of section 4 without qualification.[70] It is apparent from these provisions that "compensable" as used in the statute, means compensable in any amount.[71]

(c) The phrase "compensable by an express provision of a written or nonwritten contract" in section 4(b) of the Portal Act offers no difficulty where a written contract states that compensation shall be paid for the specific activities in question, naming them in explicit terms or identifying them through any appropriate language. Such a provision clearly falls within the statutory description.[72] The existence or nonexistence of an express provision making an activity compensable is more difficult to determine in the case of a nonwritten contract since there may well be conflicting recollections as to the exact terms of the agreement. The words "compensable by an express provision" indicate that both the intent of the parties to contract with respect to the activity in question and their intent to provide compensation for the employee's performance of the activity must satisfactorily appear from the express terms of the agreement.

(d) An activity of an employee is not "compensable by * * * a written or nonwritten contract" within the meaning of section 4(b) of the Portal Act unless the contract making the activity compensable is one "between such employee,[72] his agent, or collective-bargaining representative and his employer."[73] Thus, a provision in a contract between a government agency and the employer, relating to compensation of the contractor's employees, would not in itself establish the compensability by "contract" of an activity, for purposes of section 4.

§ 790.10 "Compensable * * * by a custom or practice."

(a) A "preliminary" or "postliminary" activity of the type described in section 4(a) of the Portal Act may be "compensable" within the meaning of section 4(b), by a custom or practice as well as by a contract. If it is so compensable, the relief afforded by section 4 is not available to the employer with respect to such activity,[74] and section 4(d) does not operate to exclude the time spent in such activity from hours worked under the Fair Labor Standards Act.[75] Accordingly, in the event that no "express provision of a written or nonwritten contract" makes compensable the activity in question, it is necessary to determine whether the activity is made compensable by a custom or practice, not inconsistent with such a contract, in effect at the establishment or other place where the employee was employed.[76]

(b) The meaning of the word "compensable" is the same, for purposes of the statute, whether a contract or a custom or practice is involved.[77]

(c) The phrase, "custom or practice," is one which, in common meaning, is rather broad in scope. The meaning of these words as used in the Portal Act is not stated in the statute; it must be ascertained from their context and from other available evidence of the Congressional intent, with such aid as may be had from the many judicial decisions interpreting the words "custom" and "practice" as used in other connections. Although the legislative history casts little light on the precise limits of these terms, it is believed that the Congressional reference to contract, custom or practice was a deliberate use of non-technical words which are commonly understood and broad enough to cover every normal situation under which an employee works or an employer for compensation.[78] Accordingly, "custom" and "practice," as used in section 4(b) of the Portal Act, may be said to be descriptive generally of those situations where an employer, without being compelled to do so by an express provision of a contract, has paid employees for certain activities performed. One of the sponsors of the legislation in the House of Representatives indicated that the intention was not only "to protect every collective bargaining agreement about these activities" but "to protect the agreement between one workman and his employer" and "every practice or custom which we assume must have entered into the minds of the people when they made the contract." [79]

---

[69] See §§ 790.5 and 790.7.

[70] The word is also so used throughout section 2 of the act which relates to past claims. See §§ 790.28–790.25.

[71] Cf. Conference Report, pp. 9, 10, 12, 13; message of the President to the Congress on approval of the Portal-to-Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[72] See colloquy between Senators Donnell and Lodge, 93 Cong. Rec. 2178; colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181–2182.

[73] The terms "employee" and "employer" have the same meaning as when used in the Fair Labor Standards Act. Portal-to-Portal Act, section 13(a).

[74] See § 790.4.

[75] See §§ 790.5 and 790.7.

[76] See Senate Report, p. 49.

The same is true with respect to the activities referred to in section 2 of the Portal Act in an action or proceeding relating to activities performed before May 14, 1947. See Senate Report, p. 45. See also § 790.23.

[77] See § 790.9(b).

(d) The words, "custom or practice," as used in the Portal Act, do not refer to industry custom or the habits of the community which are familiar to the people; these words are qualified by the phrase "in effect * * * at the establishment or other place where such employee was employed." The compensability of an activity under custom or practice, for purposes of this act, is tested by the custom or the practice at the "particular place of business," "plant," "mine," "factory," "forest," etc.[80]

(e) "The custom or practice" by which compensability of an activity is tested under the statute is one "covering such activity." Thus, a custom or practice to pay for washing up in the plant after the end of the workday, for example, would not necessarily establish the compensability of walking time thereafter from the washroom in the plant to the plant gate. It is enough, however, if there is a custom or practice covering "such activity"; there is no provision, as there is with regard to contracts, that the custom or practice be one "between such employee, his agent, or collective-bargaining representative, and his employer." [81]

(f) Another qualification of the "custom or practice" referred to in the statute is that it be "not inconsistent with a written or non-written contract" of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.[82] However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.[83]

§ 790.11 Contract, custom or practice in effect "at the time of such activity."

The "contract," "custom" or "practice" on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect "at the time of such activity." Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

§ 790.12 "Portion of the day."

A "preliminary" or "postliminary" activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section "only when it is engaged in during the portion of the day with respect to which it is so made compensable." [84] This provision in no way affects the compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act; [85] the provision is applicable only to walking, riding, traveling or other "preliminary" or "postliminary" activities of the kind described in section 4(a) of the Portal Act, [86] which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee. [87]

---

[78] See colloquy between Senators Donnell and Tydings, 93 Cong. Rec. 2125, 2126; colloquy between Senators Donnell, Lodge, and Hawkes, 93 Cong. Rec. 2178, 2179; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2181, 2182. Statements of Senator Cooper, 93 Cong. Rec. 2293.

[79] Statements of Representative Gwynne, 93 Cong. Rec. 1566.

[80] Senate Report, p. 45; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[81] See § 790.9(d).

[82] Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

[83] Senate Report, pp. 45, 49.

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

§ 790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that "the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation" or "any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged." In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the "Administrator of the Wage and Hour Division of the Department of Labor," and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing. [88] But where the acts or omissions complained of occurred before May 14, 1947, the employer may show that they were in good faith in conformity with and in reliance on "any" (written or nonwritten) administrative regulation, order, ruling, or interpretation of "any agency of the United States," or any administrative practice or enforcement policy of "any such agency" with respect to the class of employers to which he belonged. [89] In all cases, however, the act or omission complained of must be both "in conformity with" [90] and "in reliance on" [91] the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy, as the case may be, and such conformance and reliance and such act or omission must be "in good faith." [92] The relief from liability or punishment provided by sections 9 and 10 of the Portal Act is limited by the statute to employers who both plead and prove all the requirements of the defence. [93]

---

[84] Section 4(c) of the Portal Act (set out in full in § 790.3).

[85] See §§ 790.4-790.6.

[86] Conference Report, pp. 12, 13.

[87] See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

[88] Portal Act, sec. 10; Conference Report, p. 16; statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389. See also §§ 790.17, 790.19.

[89] Portal Act, sec. 10; Conference Report, p. 16; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4270; statements of Representatives Gwynne and Walter, 93 Cong. Rec. 4388, 4389. See also § 790.19.

[90] See § 790.14.

[91] See § 790.16.

[92] See § 790.15.

[93] Conference Report, pp. 15, 16; statements of Representatives Gwynne and Walter, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388, 4389; statements of Senators Cooper and Donnell, 93 Cong. Rec. 4372, 4451, 4452. See also the President's message of May 14, 1947, to the Congress on approval of the act (93 Cong. Rec. 5281).

Continued

(b) The distinctions mentioned in paragraph (a) of this section, depending on whether the acts or omissions complained of occurred before or after May 14, 1947, may be illustrated as follows: Assume that an employer, on commencing performance of a contract with X Federal Agency extending from January 1, 1947 to January 1, 1948, received an opinion from the agency that employees working under the contract were not covered by the Fair Labor Standards Act. Assume further that the employer may be said to have relied in good faith upon this opinion and therefore did not compensate such employees during the period of the contract in accordance with the provisions of the act. After completion of the contract on January 1, 1948, the employees, who have learned that they are probably covered by the act, bring suit against their employer for unpaid overtime compensation which they claim is due them. If the court finds that the employees were performing work subject to the act, they can recover for the period commencing May 14, 1947, even though the employer pleads and proves that his failure to pay overtime was in good faith in conformity with and in reliance on the opinion of X Agency, because for that period the defense would, under section 10 of the Portal Act, have to be based upon written administrative regulation, order, ruling, approval, or interpretation, or an administrative practice or enforcement policy of the Administrator of the Wage and Hour Division. The defense would, however, be good for the period from January 1, 1947 to May 14, 1947, and the employer would be freed from liability for that period under the provisions of section 9 of the statute.

§ 790.14 "In conformity with."

(a) The "good faith" defense is not available to an employer unless the acts or omissions complained of were "in conformity with" the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy upon which he relied.[94] This is true even though the employer erroneously believes he conformed with it and in good faith relied upon it; actual conformity is necessary.

(b) An example of an employer not acting "in conformity with" an administrative regulation, order, ruling, approval, practice, or enforcement policy is a situation where an employer receives a letter from the Administrator of the Wage and Hour Division, stating that if certain specified circumstances and facts regarding the work performed by the employer's employees exist, the employees are, in his opinion, exempt from provisions of the Fair Labor Standards Act. One of these hypothetical circumstances upon which the opinion was based does not exist regarding these employees, but the employer, erroneously assuming that this circumstance is irrelevant, relies upon the Administrator's ruling and fails to compensate the employees in accordance with the act. Since he did not act "in conformity" with that opinion, he has no defense under section 9 or 10 of the Portal Act.

(c) As a further example of the requirement of conformity, reference is made to the illustration given in § 790.13(b), where an employer, who had a contract with the X Federal Agency covering the period from January 1, 1947 to January 1, 1948, received an opinion from the agency that employees working on the contract were not covered by the Fair Labor Standards Act. Assume (1) that the X Agency's opinion was confined solely and exclusively to activities performed under the particular contract held by the employer with the agency and made no general statement regarding the status under the act of the

---

The requirements of the statute as to pleading and proof emphasize the continuing recognition by Congress of the remedial nature of the Fair Labor Standards Act and of the need for safeguarding the protection which Congress intended it to afford employees. See § 790.2; cf. statements of Senator Wiley, 93 Cong. Rec. 4270; Senator Donnell, 93 Cong. Rec. 4452, and Representative Walter, 93 Cong. Rec. 4388, 4389.

[94] Statement of Senator Cooper, 93 Cong. Rec. 4451; message of the President to Congress on approval of the act, May 14, 1947, 93 Cong. Rec. 5281.

employer's employees while performing other work; and (2) that the employer, erroneously believing the reasoning used in the agency's opinion also applied to other and different work performed by his employees, did not compensate them for such different work, relying upon that opinion. As previously pointed out, the opinion from the X Agency, if relied on and conformed with in good faith by the employer, would form the basis of a "good faith" defense for the period prior to May 14, 1947, insofar as the work performed by the employees on this particular contract with that agency was concerned. The opinion would not, however, furnish the employer a defense regarding any other activities of a different nature performed by his employees, because it was not an opinion concerning such activities, and insofar as those activities are concerned, the employer could not act "in conformity" with it.

§ 790.15 "Good faith."

(a) One of the most important requirements of sections 9 and 10 is proof by the employer that the act or omission complained of and his conformance with and reliance upon an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy, were in good faith. The legislative history of the Portal Act makes it clear that the employer's "good faith" is not to be determined merely from the actual state of his mind. Statements made in the House and Senate indicate that "good faith" also depends upon an objective test—whether the employer, in acting or omitting to act as he did, and in relying upon the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy, acted as a reasonably prudent man would have acted under the same or similar circumstances.[95] "Good faith" requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him upon inquiry.[96]

(b) Some situations illustrating the application of the principles stated in paragraph (a) of this section may be mentioned. Assume that a ruling from the Administrator, stating positively that the Fair Labor Standards Act does not apply to certain employees, is received by an employer in response to a request which fully described the duties of the employees and the circumstances surrounding their employment. It is clear that the employer's employment of such employees in such duties and under such circumstances in reliance on the Administrator's ruling, without compensating them in accordance with the act, would be in good faith so long as the ruling remained unrevoked and the employer had no notice of any facts or circumstances which would lead a reasonably prudent man to make further inquiry as to whether the employees came within the act's provisions. Assume, however, that the Administrator's ruling was expressly based on certain court decisions holding that employees so engaged in commerce or in the production of goods for commerce, and that the employer subsequently learned from his attorney that a higher court had reversed these decisions or had cast doubt on their correctness by holding employees similarly situated to be engaged in an occupation necessary to the production of goods for interstate commerce. Assume further that the employer, after learning of this, made no further inquiry but continued to pay the employees without regard to the requirements of the act in reliance on the Administrator's earlier ruling. In such a situation, if the employees later brought an action against the employer, the court might determine that they were entitled to the benefits of the act and might decide that the employer, after learning of the decision of the higher court, knew facts which would put a reasonably prudent man upon inquiry and therefore had not provided his good faith in relying upon the Administrator's ruling after receiving this advice.

---

[95] Colloquy between Representatives Reeves and Devitt, 93 Cong. Rec. 1593; colloquy between Senators Ferguson and Donnell, 93 Cong. Rec. 4451-4452.

[96] See statement of Senator McGrath, 93 Cong. Rec. 2254-2255; statement of Representative Keating, 93 Cong. Rec. 4391; statement of Representative Walter, 93 Cong. Rec. 4389.

(c) In order to illustrate further the test of "good faith," suppose that the X Federal Agency published a general bulletin regarding manufacturing, which contained the erroneous statement that all foremen are exempt under the Fair Labor Standards Act as employed in a "bona fide executive * * * capacity." Suppose also that an employer knowing that the Administrator of the Wage and Hour Division is charged with the duties of administering the Fair Labor Standards Act and of defining the phrase "bona fide executive * * * capacity" in that act, nevertheless relied upon the above bulletin without inquiring further and, inconformity with this advice, failed to compensate his nonexempt foremen in accordance with the overtime provisions of the Fair Labor Standards Act for work subject to that act, performed before May 14, 1947. If the employer had inquired of the Administrator or had consulted the Code of Federal Regulations, he would have found that his foremen were not exempt. In a subsequent action brought by employees under section 16(b) of the Fair Labor Standards Act, the court may decide that the employer knew facts which ought to have put him as a reasonable man upon further inquiry, and, consequently, that he did not rely "in good faith" within the meaning of section 9, upon the bulletin published by the X Agency.[97]

(d) Insofar as the period prior to May 14, 1947, is concerned, the employer may have received an interpretation from an agency which conflicted with an interpretation of the Administrator of the Wage and Hour Division of which he was also aware. If the employer chose to reply upon the interpretation of the other agency, which interpretation worked to his advantage, considerable weight may well be given to the fact that the employer ignored the interpretation of the agency charged with the administration of the Fair Labor Standards Act and chose instead to rely upon the interpretation of an outside agency.[98] Under these circumstances "the question could properly be considered as to whether it was a good faith reliance or whether the employer was simply choosing a course which was most favorable to him."[99] This problem will not arise in regard to any acts or omissions by the employer occurring on or after May 14, 1947, because section 10 provides that the employer, insofar as the Fair Labor Standards Act is concerned, may rely only upon regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of the Administrator of the Wage and Hour Division.[100]

§ 790.16 "In reliance on."

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation, order, ruling, approval, interpretation, enforcement policy or practice, the

---

[97] See statement of Representative Gwynne, 93 Cong. Rec. 1563, and colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4453.

[98] This view was expressed several times during the debates. See statements of Representative Keating, 93 Cong. Rec. 1512 and 4391; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; statement of Representative Walter, 93 Cong. Rep. 4389; statement of Representative MacKinnon, 93 Cong. Rec. 4391; statement of Representative Gwynne, 93 Cong. Rec. 1563; statement of Senator Cooper, 93 Cong. Rec. 4451; colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4452-4453.

[99] Statement of Senator Cooper, 93 Cong. Rec. 4451. Representative Walter, a member of the Conference Committee, made the following explanatory statement to the House of Representatives (93 Cong. Rec. 4390): "The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by Government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him." Representative Gwynne made a similar statement (93 Cong. Rec. 1563).

[100] Statement of Senator Wiley explaining Conference agreement to the Senate, 93 Cong. Rec. 4270; statement of Representative Walter, 93 Cong. Rec. 4389.

BEST DOCUMENT AVAILABLE

employer must also prove that he actually relied upon it.[101]

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the administrator's interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been "in reliance on" that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

§ 790.17 "Administrative regulation, order, ruling, approval, or interpretation."

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no distinction being made in regard to their function under the "good faith" defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms "regulation" and "order" are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[102]

(c) The term "interpretation" has been used to describe a statement "ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language."[103] This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term "ruling" commonly refers to an interpretation made by an agency "as a consequence of individual requests for rulings upon particular questions."[104] Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

(e) The term "approval" includes the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority.[105]

(f) The terms "administrative regulation order, ruling, approval, or interpretation" connote affirmative action on the part of an agency.[106] A failure

---

[101] In a colloquy between Senators Thye and Cooper (93 Cong. Rec. 4451), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the act "grew out of reliance upon" the ruling of an agency. See also statement of Representative Keating, 93 Cong. Rec. 1512; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; cf. colloquy between Senators Donnell and Ball, 93 Cong. Rec. 4372.

[102] See Final Report of Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong. 1st sess. (1941) p. 27; 1 Vom Baur, Federal Administrative Law (1942) p. 486; sections 2(c), 2(d) and 10(e) of the Administrative Procedure Act, 5 U.S.C.A. section 1001.

[103] Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess. (1941), p. 27.

[104] Final Report of the Attorney General's Committee, page 27. To the same effect in 1 Vom Baur, Federal Administrative Law (1942), p. 492.

[105] See section 2(e) of the Administrative Procedure Act, 5 U.S.C.A. sec. 1001.

[106] See Final Report of Attorney General's Committee, p. 27; 1 Vom Baur, Federal Administrative Law, pp. 486, 492; Conference

Continued

BEST DOCUMENT AVAILABLE

to act or a failure to reply to an inquiry on the part of an administrative agency is not a "regulation, order, ruling, approval, or interpretation" within the meaning of sections 9 and 10.[107] Thus, suppose that an employer writes a letter to the Administrator of the Wage and Hour Division, setting forth the facts concerning his business. He goes on to state in his letter that he believes his employees are not covered by the Fair Labor Standards Act, and that unless he hears to the contrary from the Administrator, he will not pay them in accordance with its provisions. When the employer does not receive a reply to his letter within what he regards as a reasonable time, he assumes that the Administrator agrees with his (the employer's) interpretation of the Act and he acts accordingly. The employer's reliance under such circumstances is not a reliance upon an administrative regulation, order, ruling, approval or interpretation, within the meaning of sections 9 and 10.

(g) The affirmative action taken by the agency must be one which actually results in a "regulation, order, ruling, approval, or interpretation." If for example, the agency declines to express an opinion as to the application of the law in a particular fact situation, the agency is refraining from interpreting the law rather than giving an interpretation.[108]

(h) An employer does not have a defense under these two sections unless the regulation, order, ruling, approval, or interpretation, upon which he relies, is in effect and operation at the time of his reliance. To the extent that it has been rescinded, modified, or determined by judicial authority to be invalid, it is no longer a "regulation, order, ruling, approval, or interpretation," and, consequently, an employer's subsequent reliance upon it offers him no defense under section 9 and 10.[109] On the other hand, the last sentence in section 9 and in section 10 expressly provides that where the employer's good faith reliance on a regulation, order, ruling, approval or interpretation occurs before it is rescinded, modified, or determined by judicial authority to be invalid, his claim of a "good faith" defense for such earlier period is not defeated by the subsequent rescission or modification or by the subsequent determination of invalidity.

(i) To illustrate these principles, assume that the Administrator of the Wage and Hour Division, in reply to an inquiry received from a particular employer, sends him a letter, in which the opinion is expressed that employees performing a particular type of work are not covered by the Fair Labor Standards Act. The employer relied upon the Administrator's letter and did not pay his employees who were engaged in such work, in accordance with the provisions of the Fair Labor Standards Act. Several months later the Administrator issues a general statement, published in the FEDERAL REGISTER and given general distribution, that recent court decisions have persuaded him that the class of employees referred to above are within the coverage of the Fair Labor Standards Act. Accordingly, the statement continues, the Administrator hereby rescinds all his previous interpretations and rulings to the contrary. The employer who had received the Ad-

---

Report, p. 16; statements of Representative Walter, 93 Cong. Rec. 4389; statements of Representative Gwynne, 93 Cong. Rec. 1491; statements of Senator Donnell, 93 Cong. Rec. 2185; President's message of May 14, 1947, on approval of the Portal-to-Portal Act (93 Cong. Rec. 5281).

[107] That this is true on and after the effective date of the act is clear from the requirement in section 10 that the regulation, order, ruling, approval or interpretation relied on must be that of the Administrator in writing. As to section 9, the terms appear to have no different meaning.

[108] See Final Report of Attorney General's Committee on Administrative Procedure, p. 33.

[109] See House Report, p. 7, and statements of Representative Gwynne, 93 Cong. Rec. 1491, 1492, 1563. It will be noted that the provisions of section 12 of the act, affording relief of employers who acted in conformity with the invalidated "area of production" regulations, would have been unnecessary if reliance could be placed on a regulation no longer in effect. See statement of Representative Gwynne, 93 Cong. Rec. 4388, and cf. remarks of Senator McCarran, discussing the bill before section 12 was added by the conference committee, 93 Cong. Rec. 2247.

BEST DOCUMENT AVAILABLE

ministrator's letter, not learning of the Administrator's subsequent published statement rescinding his contrary interpretations, continued to rely upon the Administrator's letter after the effective date of the published statement. Under these circumstances, the employer would, from the date he received the Administrator's letter to the effective date of the published statement rescinding the position expressed in the letter, have a defense under section 9 or 10, assuming he relied upon and conformed with that letter in good faith. However, in spite of the fact that this employer did not receive actual notice of the subsequent published statement, he has no defense for his reliance upon the letter during the period after the effective date of the public statement, because the letter, having been rescinded, was no longer an "administrative * * * ruling * * * or interpretation" within the meaning of sections 9 and 10.[110]

§ 790.18 "Administrative practice or enforcement policy."

(a) The terms "administrative practice or enforcement policy" refer to courses of conduct or policies which an agency has determined to follow[111] in the administration and enforcement of a statute, either generally, or with respect to specific classes of situations.[112] Administrative practices and enforcement policies may be set forth in statements addressed by the agency to the public.[113] Although they may be, and frequently are, based upon decisions or views which the agency has set forth in its regulations, orders, rulings, approvals, or interpretations, nevertheless administrative practices and enforcement policies differ from these forms of agency action in that such practices or policies are not limited to matters concerned with the meaning or legal effect of the statutes administered by the agency and may be based wholly or in part on other considerations.

(b) To illustrate this distinction, suppose the Administrator of the Wage and Hour Division issues a general statement indicating that in his opinion a certain class of employees come within a specified exemption from provisions of the Fair Labor Standards Act in any workweek when they do not engage in a substantial amount of nonexempt work. Such a statement is an "interpretation" within the meaning of sections 9 and 10 of the Portal Act. Assume that at the same time, the Administrator states that for purposes of enforcement, until further notice such an employee will be considered as engaged in a substantial amount of nonexempt work in any workweek when he spends in excess of a specified percentage of his time in

---

[110] See Final Report of Attorney General's Gwynne, 93 Cong. Rec. 1563; colloquy between Representative Gwynne and Lee Pressman, Hearings before House Subcommittee on the Judiciary, pp. 156-7.

The fact that an employer has no defense under section 9 or 10 of the Portal Act in the situation stated in the text would not, of course, preclude a court from finding that he acted in good faith having reasonable grounds to believe he was not in violation of the law. In such event, section 11 of the act would permit the court to reduce or eliminate the employer's liability for liquidated damages in an employee suit. See § 790.22.

[111] The agency may have determined to follow the course of conduct or policy for a limited time only (see paragraphs (c) and (f), this section) or for an indefinite time (see paragraph (b), this section), or for a period terminable by the happening of some contingency, such as a final decision in pending litigation.

[112] See United States v. Minnesota, 270 U.S. 181 (1926); United States v. Boston & Maine R.R. Co., 279 U.S. 732 (1929); Lucas v. American Code Co., 280 U.S. 445 (1930); Estate of Sanford v. Commissioner of Internal Revenue, 308 U.S. 39 (1939). See also Final Report of Attorney General's Committee on Administrative Procedure in Government Agencies, pp. 26-29; 1 Von Baur, Federal Administrative Law (1942), p. 474.

As to requirement that practice or policy be one with respect to a "class of employers," see paragraph (g) of this section.

[113] Pursuant to section 3 of the Administrative Procedure Act, statements of general policy formulated and adopted by the agency for the guidance of the public are published in the FEDERAL REGISTER. An example is the statement of the Secretary of Labor and the Administrator of the Wage and Hour Division, dated June 16, 1947, published in 12 FR 3915.

BEST DOCUMENT AVAILABLE

such nonexempt work. This latter type of statement announces an "administrative practice or enforcement policy" within the meaning of sections 9 and 10 of the Portal Act.

(c) An administrative practice or enforcement policy may, under certain circumstances be at variance with the agency's current interpretation of the law. For example, suppose the Administrator announces that as a result of court decisions he has changed his view as to coverage of a certain class of employees under the Fair Labor Standards Act. However, he may at the same time announce that in order to give affected employers an opportunity to make the adjustments necessary for compliance with the changed interpretation, the Wage and Hour Division will not commence to enforce the Act on the basis of the new interpretation until the expiration of a specified period.

(d) In the statement of the managers on the part of the House, accompanying the report of the Conference Committee on the Portal-to-Portal Act, it is indicated (page 16) that under sections 9 and 10 "an employer will be relieved from liability, in an action by an employee, because of reliance in good faith on an administrative practice or enforcement policy only (1) where such practice or policy was based on the ground that an act or omission was not a violation of the (Fair Labor Standards) act, or (2) where a practice or policy of not enforcing the act with respect to acts or omissions led the employer to believe in good faith that such acts or omissions were not violations of the Act."

(e) The statement explaining the Conference Committee Report goes on to say, "However, the employer will be relieved from criminal proceedings or injunctions brought by the United States, not only in the cases described in the preceding paragraph, but also where the practice or policy was such as to lead him in good faith to believe that he would not be proceeded against by the United States."

(f) The statement explaining the Conference Committee Report gives the following illustrations of the above rules:

An employer will not be relieved from liability under the Fair Labor Standards Act of 1938 to his employees (in an action by them) for the period December 26, 1946, to March 1, 1947, if he is not exempt under the "Area of Production" regulations published in the Federal Register of December 25, 1946, notwithstanding the press release issued by the Administrator of the Wage and Hour Division of the Department of Labor, in which he stated that he would not enforce the Fair Labor Standards Act of 1938 on account of acts or omissions occurring prior to March 1, 1947. On the other hand, he will, by reason of the enforcement policy set forth in such press releases, have a good defense to a criminal proceeding or injunction brought by the United States based on an act or omission prior to March 1, 1947.

(g) It is to be noted that, under the language of sections 9 and 10, an employer has a defense for good faith reliance on an administrative practice or an enforcement policy only when such practice or policy is "with respect to the class of employers to which he belonged." [114] Thus where an enforcement policy has been announced pertaining to laundries and linen-supply companies serving industrial or commercial establishments the operator of an establishment furnishing window-washing service to industrial and commercial concerns, who relied upon that policy in regard to his employees, has no defense under sections 9 and 10. The enforcement policy upon which he claimed reliance did not pertain to "the class of employers to which he belonged."

(h) Administrative practices and enforcement policies, similar to administrative regulations, orders, rulings, approvals and interpretations required affirmative action by an administrative agency.[115] This should not be construed as meaning that an agency may not have administrative practices or policies to refrain from taking certain action as well as practices or policies contemplating positive acts of some kind.[116] But before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency.[117] Suppose, for example, that shoe factories in a particular area were not investigated by Wage and Hour Division inspectors operating in the area. This fact would not establish the existence of a practice or policy of the Administrator to treat the employees of such establishments, for enforcement purposes, as not subject to the provisions of the Fair Labor Standards Act, in the absence of proof of some affirmative action by the Administrator adopting such a practice or policy. A failure to inspect might be due to any one of a number of different reasons. It might, for instance, be due entirely to the fact that the inspectors' time was fully occupied in inspections of other industries in the area.

---

[114] This provision, which appeared for the first time in the conference bill, to which the term "practice" was restored after elimination by the Senate, was apparently designed to meet some of the objections which led to elimination of the word "practice" from the bill reported by the Senate Judiciary Committee. Cf. remarks of Senator Murray, 93 Cong. Rec. 2238; remarks of Senator Johnston, 93 Cong. Rec. 2373; colloquy between Senators Lucas and Donnell, 93 Cong. Rec. 2185; remarks of Senator McGrath, 93 Cong. Rec. 2254–2256.

(i) It was pointed out above that sections 9 and 10 do not offer a defense to the employer who relies upon a regulation, order, ruling, approval or interpretation which at the time of his reliance has been rescinded, modified or determined by judicial authority to be invalid. The same is true regarding administrative practices and enforcement policies.[118] However, a plea of a "good faith" defense is not defeated by the fact that after the employer's reliance, the practice or policy is rescinded, modified, or declared invalid.

§ 790.19 "Agency of the United States."

(a) In order to provide a defense under section 9 or section 10 of the Portal Act, the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of an "agency of the United States." Insofar as acts or omissions occurring on or after May 14, 1947 are concerned, it must be that of the "agency of the United States specified in" section 10(b), which, in the case of the Fair Labor Standards Act, is "the Administrator of the Wage and House Division of the Department of Labor." However, with respect to acts or omissions occurring prior to May 14, 1947, section 9 of the act permits the employer to show that he relied upon and conformed with a regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of "any agency of the United States."[119]

(b) The Portal Act contains no comprehensive definition of "agency" as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the "agency" whose regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy may be relied on is confined to "the agency of the United States" specified in the section, the act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved.[120] Similarly, the definitions of "agency" in other Federal statutes[121] indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment.[122] furthermore, it appears from the statement of the managers on the part of the House accompanying the Conference Committee Report, that the term "agency" as appearing in the Portal Act was employed in this sense. As there stated (p.16), the regulations, orders, ruling, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with "must be those of an 'agency' and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the (Fair Labor Standards) act, the employer is not relieved from liability, despite his reliance in good faith on such interpretations, unless it is in fact the interpretation of the agency."[123] Similarly, the Chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the "good faith" defense. "It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling."[124]

---

[115] See Union Stockyards & Transit Co. v. United States, 308 U.S. 213, 223 (1939); and United States v. American Union Transport, Inc., 327 U.S. 437, 454 (1946). Cf. Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 351 (1941). See also President's message of May 14, 1947, 93 Cong. Rec. 5281.

[116] See, for example, Mintz v. Baldwin, 289 U.S. 346, 349 (1933), where the Department of Agriculture announced "its policy for the present is to leave the control (of Bang's disease) with the various States." See also in this connection the statement of June 23, 1947, by the Senate Committee on the Judiciary regarding the President's message of May 14, 1947, on the Portal-to-Portal Act, 93 Cong. Rec. 5281.

[117] Union Stockyards & Transit Co. v. United States, supra. It may be noted in this connection that examples given by the sponsors of the legislation, in discussing the terms "administrative practice or enforcement policy," involved situations in which affirmative action had been taken by the agency. Conference Report, p. 16; 93 Cong. Rec. 2185, 2198, 4389-4391.

[118] See § 790.17 (h) and (i), and footnotes 111 and 112.

[119] The differences in the provisions of the two sections are explained and illustrated in § 790.13.

(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of a final nature as the official act or policy of the agency.[125] Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of the agency within the meaning of sections 9 and 10.

RESTRICTIONS AND LIMITATIONS ON EMPLOYEE SUITS

§ 790.20 Right of employees to sue; restrictions on representative actions.

Section 16(b) of the Fair Labor Standards Act, as amended by section 5 of the Portal Act, no longer permits an employee or employees to designate an agent or representative (other than a member of the affected group) to maintain, an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may still be brought in accordance with the provisions of section 16(b). With respect to these actions, the amendment provides that no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The amendment is expressly limited to actions which are commenced on or after the date of enactment of the Portal Act. Representative actions which were pending on May 14, 1947 are not affected by this amendment.[126] However, under sections 6 and 8 of the Portal Act, a collective or representative action commenced prior to such date will be barred as to an individual claimant who was not specifically named as a party plaintiff to the action on or before September 11, 1947, if his written consent to become such a party is not filed with the court within a prescribed period.[127]

---

[120] In regard to the Walsh-Healey Act, "agency" is defined in section 10 of the Portal-to-Portal Act as including, in addition to the Secretary of Labor, "any Federal officer utilized by him in the administration of such act." The legislative history of the Portal-to-Portal Act (93 Cong. Rec. 2239-2240) reveals that this clause was added because of the language in the Walsh-Healey Act authorizing the Secretary of Labor to administer the act "and to utilize such Federal officers and employees * * * as he may find necessary in the administration."

[121] Federal Register Act, 44 U.S.C. sec. 304; Federal Reports Act, 5 U.S.C. sec. 139; Administrative Procedure Act, 5 U.S.C. sec. 1001.

[122] See Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942); United States v. Watashe, 102 F. (2d) 428 (C.A. 10, 1939); 39 Opinions Attorney General 15 (1925). Cf. Keyser v. Hitz, 133 U.S. 138 (1890); 39 Opinions Attorney General 541 (1933); 13 George Washington Law Review 144 (1945)

[123] See also statement by Representative Gwynne, 93 Cong. Rec. 1563; and statement by Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4270.

[124] Statement of Senator Wiley, 93 Cong. Rec. 4270.

[125] Statement by Representative Gwynne, 93 Cong. Rec. 1563; statements by Representative Walter, 93 Cong. Rec. 1496-1497, 4389; statement by Representative Robsion, 93 Cong. Rec. 1500; statement by Senator Thye, 93 Cong. Rec. 4452.

§ 790.21 Time for bringing employee suits.

(a) The Portal Act[128] provides a statute of limitations fixing the time limits within which actions by employees under section 16(b) of the Fair Labor Standards Act[129] may be commenced, as follows:

(1) Actions to enforce causes of action accruing on or after May 14, 1947; two years.

(2) Actions to enforce causes of action accruing before May 14, 1947.[130] Two years or period prescribed by applicable State statute of limitations, whichever is shorter.

These are maximum periods for bringing such actions, measured from the time the employee's cause of action accrues to the time his action is commenced.[131]

(b) The courts have held that a cause of action under the Fair Labor Standards Act for unpaid minimum wages or unpaid overtime compensation and for liquidated damages "accrues" when the employer fails to pay the required compensation for any workweek at the regular pay day for the period in which the workweek ends.[132] The Portal Act[133] provides that an action to enforce such a cause of action shall be considered to be "commenced":

(1) In individual actions, on the date the complaint is filed;

(2) In collective or class actions, as to an individual claimant.

---

[126] Conference Report, p. 13.

[127] Conference Report, pp. 14, 15. The claimant must file this consent within the shorter of the following two periods: (1) Two years, or (2) the period prescribed by the applicable State Statute of limitations. See Conference Report, p. 15.

[128] See sections 6-8 inclusive.

[129] Sponsors of the legislation stated that the time limitations prescribed therein apply only to the statutory actions, brought under the special authority contained in section 16(b), in which liquidated damages may be recovered, and do not purport to affect the usual application of State statutes of limitation to other actions brought by employees to recover wages due them under contract, at common law, or under State statutes. Statements of Representative Gwynne, 93 Cong. Rec. 1491, 1557-1588; colloquy between Representative Robsion, Vorys, and Celler, 93 Cong. Rec. 1495.

[130] This refers to actions commenced after September 11, 1947. Such actions commenced on or between May 14, 1947 and September 11, 1947 were left subject to State statutes of limitations. As to collective and representatives actions commenced before May 14, 1947, section 8 of the Portal Act makes the period of limitations stated in the text applicable to the filing, by certain individual claimants, of written consents to become parties plaintiff. See Conference Report, p. 15; § 790.20 of this part.

[131] Conference Report, pp. 13-15.

[132] Reid v. Solar Corp., 69 F. Supp. 626 (N.D. Iowa); Mid-Continent Petroleum Corp. v. Keen, 157 F. (2d) 310, 316 (C.A. 8). See also Brooklyn Savings Bank v. O'Neil, 324 U.S. 697; Rigopoulos v. Kervan, 140 F. (2d) 506 (C.A. 2).

In some instances an employee may receive, as a part of his compensation, extra payments under incentive or bonus plans, based on factors which do not permit computation and payment of the sums due for a particular workweek or pay period until some time after the pay day for that period. In such cases it would seem that an employee's cause of action, insofar as it may be based on such payments, would not accrue until the time when such payment should be made. Cf. Walling v. Harnischfeger Corp., 325 U.S. 427.

[133] Section 7. See also Conference Report, p. 14.

(i) On the date the complaint is filed, if he is specifically named therein as a party plaintiff and his written consent to become such is filed with the court on that date, or

(ii) On the subsequent date when his written consent to become a party plaintiff is filed in the court, if it was not so filed when the complaint was filed or if he was not then named therein as a party plaintiff.[134]

(c) The statute of limitations in the Portal Act is silent as to whether or not the running of the two-year period of limitations may be suspended for any cause.[135] In this connection, attention is directed to section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940,[136] as amended, which provides that the period of military service shall not be included in the period limited by law for the bringing of an action or proceeding, whether the cause of action shall have accrued prior to or during the period of such service.

§ 790.22 Discretion of court as to assessment of liquidated damages.

(a) Section 11 of the Portal Act provides that in any action brought under the Fair Labor Standards Act to recover unpaid minimum wages, unpaid overtime, compensation, or liquidated damages, the court may, subject to prescribed conditions, in its sound discretion award no liquidated damages or award any amount of such damages not to exceed the amount specified in section 16 (b) of the Fair Labor Standards Act.[137]

(b) The conditions prescribed as prerequisites to such an exercise of discretion by the court are two: (1) The employers must show to the satisfaction of the court that the act or omission giving rise to such action was in good faith; and (2) he must show also, to the satisfaction of the court, that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act. If these conditions are met by the employer against whom the suit is brought, the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer. This may be done in any action brought under section 16(b) of the Fair Labor Standards Act, regard-

---

[134] This is also the rule under section 8 of the Portal Act as to individual claimants, in collective or representative actions commenced before May 14, 1947, who were not specifically named as parties plaintiff on or before September 11, 1947.

[135] A limited suspension provision was contained in section 2(d) of the House bill, but was eliminated by the Senate. Neither the Senate debates, the Senate committee report, nor the conference committee report, indicate the reason for this. While the courts have held that in a proper case, a statute of limitations may be suspended by causes not mentioned in the statute itself (Braun v. Sauerwein, 10 Wall. 218, 223; see also Richards v. Maryland Ins. Co., 8 Cranch 84, 92; Bauserman v. Blunt, 147 U.S. 647), they have also held that when the statute has once commenced to run, its operation is not suspended by a subsequent disability to sue, and that the bar of the statute cannot be postponed by the failure of the creditor (employee) to avail himself of any means within his power to prosecute or to preserve his claim. Bauserman v. Blunt, 147 U.S. 647, 657; Smith v. Continental Oil Co., 59 F. Supp. 91, 94.

[136] Act of October 17, 1940, ch. 888, 54 Stat. 1178, as amended by the act of October 6, 1942, ch. 581, 56 Stat. 769 (50 U.S.C.A. App. sec. 525).

[137] Section 16(b) of the Fair Labor Standards Act provides that an employer who violates the minimum—wage or overtime provisions of the act shall be liable to the affected employees not only for the amount of the unpaid minimum wages or unpaid overtime compensation, as the case may be, but also for an additional equal amount as liquidated damages. The courts have held that this provision is "not penal in its nature" but rather that such damages "constitute compensation for the retention of a workman's pay" where the required wages are not paid "on time." Under this provision of the law, the courts have held that the liability of an employer for liquidated damages in an amount equal to his underpayments of required wages become fixed at the time he fails to pay such wages when due, and the courts were given no discretion, prior to the enactment of the Portal-to-Portal Act, to relieve him of any portion of this liability. See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697; Overnight Motor Transp. Co. v. Missel, 316 U.S. 572.

BEST DOCUMENT AVAILABLE

less of whether the action was instituted prior to or on or after May 14, 1947, and regardless of when the employee activities on which it is based were engaged in. If, however, the employer does not show to the satisfaction of the court that he has met the two conditions mentioned above, the court is given no discretion by the statute, and it continues to be the duty of the court to award liquidated damages.[138]

(c) What constitutes good faith on the part of an employer and whether he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act are mixed questions of fact and law, which should be determined by objective tests.[139] Where an employer makes the required showing, it is for the court to determine in its sound discretion what would be just according to the law on the facts shown.

(d) Section 11 of the Portal Act does not change the provisions of section 16(b) of the Fair Labor Standards Act under which attorney's fees and court costs are recoverable when judgment is awarded to the plaintiff.

PART 791—JOINT EMPLOYMENT RELATIONSHIP UNDER FAIR LABOR STANDARDS ACT OF 1938

Sec.
791.1 Introductory statement.
791.2 Joint employment.

§ 791.1 Introductory statement.

The purpose of this part is to make available in one place the general interpretations of the Department of Labor pertaining to the joint employment relationship under the Fair Labor Standards Act of 1938.[1] It is intended that the positions stated will serve as "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."[2] These interpretations contain the construction of the law which the administrator believes to be correct and which will guide him in the performance of his duties under the act, unless and until he is otherwise directed by authoritative decisions of the courts or he concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, and enforcement policies relating to sections 3 (d), (e) and (g) of the act, which define the terms "employer", "employee", and "employ", are inconsistent or in conflict with the principles stated in this part they are hereby rescinded. The interpretations contained in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act,[3] so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

(52 Stat. 1060, as amended; 29 U.S.C. 201-219)

[23 FR 5905, Aug. 5, 1958]

§ 791.2 Joint Employment.

(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.[4] On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.[5] In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

---

[138] See Conference Report, p. 17; remarks of Representative Walter, 93 Cong. Rec. 1496-1497; President's message of May 14, 1947, to the Congress on approval of the Portal Act, 93 Cong. Rec. 5281.

[139] Cf. §§ 790.13 to 790.16.

[1] 29 U.S.C. 201-219. Under Reorganization Plan No. 6 of 1950 and pursuant to General Order No. 45-A, issued by the Secretary of Labor on May 24, 1950, interpretations of the provisions (other than the child labor provisions) of the act are issued by the Administrator of the Wage and Hour Division on the advice of the Solicitor of Labor. See 15 FR 3290.

[2] Skidmore v. Swift and Company, 323 U.S. 134, 138.

[3] 61 Stat. 84; 29 U.S.C. 251-262.

(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;[6] or

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee;[7] or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.[8]

(52 Stat. 1060, as amended; 29 U.S.C. 201-219)

[23 FR 5905, Aug. 5, 1958, as amended at 26 FR 7732, Aug. 18, 1961]

PART 793—EXEMPTION OF CERTAIN RADIO AND TELEVISION STATION EMPLOYEES FROM OVERTIME PAY REQUIREMENTS UNDER SECTION 13(b)(9) OF THE FAIR LABOR STANDARDS ACT

INTRODUCTORY

Sec.

793.0 Purpose of interpretative bulletin.
793.1 Reliance upon interpretations.
793.2 General explanatory statement.

REQUIREMENTS FOR EXEMPTION

793.3 Statutory provision.
793.4 General requirements for exemption.
793.5 What determines application of the exemption.
793.6 Exemption limited to employees in named occupations.
793.7 "Announcer."

---

[4] Walling v. Friend, et al., 156 F. 2d 429 (C. A. 8).

[5] Both the statutory language (section 3(d) defining "employer" to include anyone acting directly or indirectly in the interest or an employer in relation to an employee) and the Congressional purpose as expressed in section 2 of the Act, require that employees generally should be paid overtime for working more than the number of hours specified in section 7(a), irrespective of the number of employers they have. Of course, an employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of "joint employers" and permit or require the employee to work more than the number of hours specified in section 7(a), both the letter and the spirit of the statute require payment of overtime.

[6] Mid-Continent Pipeline Co., et al. v. Hargrave, 129 F. 2d 655 (C.A. 10); Slover v. Wathen, 140 F. 2d 258 (C.A. 4); Mitchell v. Bowman, 131 F. Supp., 520 (M.D. Ala. 1954); Mitchell v. Thompson Materials & Construction Co., et al., 27 Labor Cases Para. 68, 888; 12 WH Cases 367 (S.D. Calif. 1954).

[7] Sec. 3(d) of the Act; Greenberg v. Arsenal Building Corp., et al., 144 F. 2d 292 (C.A. 2).

[8] Dolan v. Day & Zimmerman, Inc., et al., 65 F. Supp. 923 (D. Mass. 1946); McComb v. Midwest Rust Proof Co., et al., 16 Labor Cases Para. 64, 927; 8 WH Cases 460 (E.D. Mo. 1948); Durkin v. Waldron., et al., 130 F. Supp., 501 (W.D. La. 1955). See also Wabash Radio Corp. v. Walling, 162 F. 2d 391 (C.A. 6).

BEST DOCUMENT AVAILABLE

Sec.
793.8 "News editor."
793.9 "Chief engineer."
793.10 Primary employment in named occupations.
793.11 Combination announcer, news editor and chief engineer.
793.12 Related and incidental work.
793.13 Limitation on related and incidental work.
793.14 Employed by.
793.15 Duties away from the station.
793.16 "Radio or television station."
793.17 "Major studio."
793.18 Location of "major studio."

WORKWEEK APPLICATION OF EXEMPTION

793.19 Workweek is used in applying the exemption.
793.20 Exclusive engagement in exempt work.
793.21 Exempt and nonexempt work.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201-219.

SOURCE: 26 FR 10275, Nov. 2, 1961, unless otherwise noted.

INTRODUCTORY

§ 793.0 Purpose of interpretative bulletin.

This Part 793 constitutes the official interpretative bulletin of the Department of Labor with respect to the meaning and application of section 13(b)(9) of the Fair Labor Standards Act of 1938, as amended. This section provides an exemption from the overtime pay provisions of the Act for certain employees employed by certain small market radio and television stations. This exemption was added to the Act by the 1961 amendments. It is the purpose of this bulletin to make available in one place the interpretations of the provisions in section 13(b) (9) which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon re-examination of an interpretation, that it is incorrect.

§ 793.1 Reliance upon interpretations.

The interpretations of the law contained in this part are official interpretations which may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947. All prior opinions, rulings and interpretations which are inconsistent with the interpretations in this bulletin are rescinded and withdrawn.

§ 793.2 General explanatory statement.

Some employees of radio and television stations perform work which may be exempt from the minimum wage and overtime requirements under section 13(a) (1) of the Act. This 13(a) (1) exemption applies to employees employed in a bona fide executive, administrative or professional capacity, or in the capacity of outside salesman, as these terms are defined and delimited by regulations of the Secretary. This exemption continues to be available for employees of radio and television stations who meet the requirements for exemption specified in Part 541 of this chapter. The section 13(b) (9) exemption, which is an exemption from the overtime provisions of the Act, but not from the minimum wage requirements, applies to a limited classification of employees employed by small market radio and television stations whose employment meets the requirements for the exemption. These requirements and their meaning and application are discussed in this bulletin.

REQUIREMENTS FOR EXEMPTION

§ 793.3 Statutory provision.

Section 13(b) (9) of the Act exempts from the overtime requirements of section 7, but not from the minimum wage provisions of section 6, of the Act:

> any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area.

BEST DOCUMENT AVAILABLE

§ 793.4 General requirements for exemption.

All of the following requirements must be met in order that an employee may be exempt under section 13(b) (9):

(a) The employee must be "employed as" an announcer, or a news editor, or a chief engineer.

(b) The employee must be employed "by" a radio or television station.

(c) The major studio of such radio or television station must be located in a city or town which meets the prescribed population and locality tests.

§ 793.5 What determines application of the exemption.

The exemption applies only to an employee who is "employed as" an announcer, news editor, or chief engineer under the conditions specified in section 13(b) (9). Although the nature of the employer's business is important in applying the exemption to a particular employee in one of the named occupations, employment in the named occupation is an essential prerequisite for exemption. Whether an employee is exempt therefore depends upon an examination of his duties as well as the nature of the employer's activities. Some employees of the employer may be exempt and others may not.

§ 793.6 Exemption limited to employees in named occupations.

The legislative history of section 13(b)(9) makes it clear that the exemption is specifically limited to employees employed in the specified occupations (S. Rept. 145, 87th Cong. 1st sess., p. 37). To be exempt, therefore, an employee must be employed in the named occupations of announcer, a news editor, or a chief engineer. In applying this test to an employee, his title or job description is not determinative. His aggregate duties, as evidenced by the work which he actually performs in his everyday activities, determines the nature of his occupation. The employee's duties, taken as a whole, must characterize the occupation of the employee as that of announcer, news editor, or chief engineer, if the statutory requirement that he be "employed as" such an employee is to be satisfied (see Walling v. Haden, 153 F. 2d 196, cert. denied 328 U.S. 866). This exemption does not apply to employees who are employed in occupations other than those of announcer, news editor, or chief engineer.

§ 793.7 "Announcer."

An announcer is an employee who appears before the microphone or camera to introduce programs, read news announcements, present commercial messages, give station identification and time signals, and present other similar routine on-the-air material. In small stations, an announcer may, in addition to these duties, operate the studio control board, give cues to the control room for switching programs, make recordings, make the necessary preparations for the day's programs, play records, or write advertising, promotional or similar type copy. An employee who is primarily engaged in the above described activities and in activities which are an integral part thereof will be considered to be employed as an announcer within the meaning of the exemption in section 13(b)(9).

§ 793.8 "News editor."

A news editor is an employee who gathers, edits and rewrites the news. He may also select and prepare news items for broadcast and present the news on the air. An employee who is primarily engaged in the above duties and in activities which are an integral part thereof will be considered to be employed as a news editor within the meaning of the exemption in section 13(b)(9).

§ 793.9 "Chief engineer."

A chief engineer is an employee who primarily supervises the operation maintenance and repair of all electronic equipment in the studio and at the transmitter and is licensed by the Federal Communications Commission as a Radio Telephone Operator First Class. In small stations, only one such engineer may be employed, and in some cases he may be assisted by part-time workers from other departments. The engineer in such cases will be regarded as employed as the "chief engineer" for purposes of the section 13(b) (9) exemption provided that he performs the duties described above and is properly licensed by the Federal Communications Commission. Where two or more engineers are employed by a station, only one may qualify as "chief engineer"—that one who, on the basis of the factual situation, is in charge of the engineering work.

§ 793.10 Primary employment in named occupation.

The legislative history of the exemption is explicit that the exemption applies only to an employee who is employed "primarily" as an announcer, news editor, or chief engineer. Thus the Senate Report states: "The exemption is specifically limited to those employees who are employed primarily in the named occupations * * *" (S. Rept. 145, 87th Cong., 1st sess., p. 37). No specific rule can be established for determining whether in any given case an employee is employed "primarily" in the named occupations. Generally, however, where an employee spends more than half of the hours he works in a workweek in a named occupation, he will be considered to be primarily employed in such occupation during that workweek. The answer will necessarily depend upon the facts in each case.

§ 793.11 Combination announcer, news editor and chief engineer.

The 13(b)(9) exemption, as was made clear during the debate on the amendment, is intended to apply to employees employed in the named occupations by small market radio and television stations. It is known at the time of such debate that these stations employ only a small number of employees and that, at times, an employee of such a station may perform a variety of duties in connection with the operation of the station. For example, an employee may perform work both as an announcer and as a news editor. In such cases, the primary employment test under the section 13(b)(9) exemption will be considered to be met by an employee who is employed primarily in any one or any combination of the named occupations. Thus an employee who works both as an announcer and news editor for the greater part of the workweek will be considered to be primarily employed in the named occupations during that week.

§ 793.12 Related and incidental work.

An employee who is employed primarily in one or more of the named occupations may also be engaged in other duties pertaining to the operation of the station by which he is employed. The Senate Report states that, for purposes of this exemption, employees who are primarily employed in the named occupation "may engage in related activities, including the sale of broadcasting time for the broadcasting company by which they are employed, as an incident to their principal occupation", (S. Rept. 145, 87th Cong., 1st sess., p. 37). Time spent in such duties will not be considered to defeat the exemption if the employee is primarily employed in the named occupations and if the other requirements of the exemption are met.

§ 793.13 Limitation on related and incidental work.

The related work which an employee may perform is clearly limited in nature and extent by a number of requirements. One limitation is that the work must be an incident to the employee's primary occupation. The work therefore may not predominate over his primary job. He is not "employed as" an announcer, news editor, or chief engineer if his dominant employment is in work outside such occupations (see Walling v. Haden, 153 F. 2d 196, cert. denied 328 U.S. 866). For instance, an announcer who spends 40 hours of his 48 hour workweek in selling broadcasting time would not be considered to be "incidentally" engaged in such selling. Selling would in such circumstances be his primary occupation. His duties as an announcer must constitute his primary job. Another requirement is that the work of the employees must be performed "for the broadcasting company by which they are employed * * *" (see S. Rept. cited in § 793.12). Sale of broadcasting time for a company which does not employ the employee as an announcer, news editor, or chief engineer, is not exempt work. Work which is not performed for the station by which the employee is employed, is not intended to be exempt. For a discussion of the effect on the exemption of nonexempt work see §§ 793.19 to 793.21.

§ 793.14 Employed by.

The application of the exemption is limited to employees "employed by" a radio or television station. The question whether a worker is employed "by" a radio or television station depends on the particular facts. (See Rutherford Food Corporation v. McComb, 331 U.S. 722; U.S. v. Silk, 331 U.S. 704.) In general, however, an employee is so employed where he is hired by the radio or television station, engages in its work, is paid by the radio or television station and is under its supervision and control. Employees of independent contractors and of others who work for a radio or television station but who are not "employed by" such station are not exempt under this exemption even if they engage in the named occupation. (Mitchell v. Kroger, 248, F. 2d 935.)

§ 793.15 Duties away from the station.

An employee who is "employed by" a radio or television station in one or more of the named occupations may perform his work at the station or away from the station so long as his activities meet the requirements for exemption.

§ 793.16 "Radio or television station."

The employee must be employed by a "radio or television station." A radio or television station is one which is designated and licensed as such by the Federal Communications Commission.

§ 793.17 "Major studio."

The exemption further depends on whether "the major studio" of the radio or television station which employes the employee is in a city or town as defined in section 13(b)(9). The location of secondary studios of the radio or television station is immaterial. It is the location of the "major" studio that determines the qualification of the employer for the exemption. A major studio for purposes of the exemption is the main studio of the radio or television station as designated on the station's license by the Federal Communications Commission. It is this major studio which must be located in the city or town as defined in section 13(b)(9) of the Act.

§ 793.18 Location of "major studio."

Section (b)(9) specifies that the "major studio" must be located "(A) in a city or town of one hundred thousand population or less according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area." These tests may be summarized as follows:

(a) *A city or town with more than 100,000 population.* The exemption does not apply to any employee of a radio or television station the major studio of which is located in any city or town with a population in excess of 100,000.

(b) *A city or town with 100,000 population or less.* The exemption may apply if the major studio is located in a city or town of not more than 100,000 population: *Provided,* That the city or town is not within a standard metropolitan statistical area which has more than 100,000 population.

(c) *A city or town with 25,000 population or less.* The exemption may apply even if the major studio is located in a city or town that is within a standard metropolitan statistical area which has more than 100,000 population: *Provided,* That such city or town has a population or not more than 25,000 and the city or town is at least 40 airline miles from the principal city in such area.

(d) *Sources of information.* The Bureau of the Budget issues periodically a booklet entitled "Standard Metropolitan Statistical Areas", which lists and describes these areas in the United States and Puerto Rico. The booklet lists the standard metropolitan statistical areas by name and shows their population according to the latest available decennial census figures as compiled by the Bureau of the Census. The booklet also lists the major cities within each standard metropolitan statistical area and the population of these cities. From time to time, new areas are designated as "standard metropolitan statistical areas" and areas once designated as such are deleted from the area definitions. This booklet may be purchased, for 25 cents, from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(e) *Principal city.* The term "principal city", as used in section 13(b)(9), means the "central city", or cities, of the standard metropolitan statistical area, which are defined and designated as such by the Bureau of the Census. The name of the "central city" is incorporated in the name of the standard metropolitan statistical area. Where two or more cities are designated by the Bureau of the Census as the "central cities", the names of such cities appear in the title of the standard metropolitan statistical area. For example, the "Duluth-Superior" standard metropolitan statistical area, has two "central" cities, namely Duluth and Superior; both appear in the title of the standard metropolitan statistical area, and both are regarded as "principal" cities for purposes of the section 13(b)(9) exemption. Where, as in the example, more than one city is designated as the "central" city airline mileage will be measured from that "central" city which is nearest to the city or town in which the major studio of the radio or television station is located.

(f) *Determining the population.* The population of a city or town, or of a standard metropolitan statistical area, will be determined by the latest available decennial census figures as compiled by the U.S. Bureau of the Census.

(g) *Measuring airline miles.* Airline miles for purposes of the section 13(b)(9) exemption are measured, with a straight edge on a map, from the zero milestone, or the city hall, of the "central" city, to the zero milestone, or city or town hall, of the city or town in which the major studio of the radio or television station is located.

WORKWEEK APPLICATION OF EXEMPTION

§ 793.19 Workweek is used in applying the exemption.

The unit of time to be used in determining the application of the exemption under section 13(b)(9) to an employee is the workweek. (See Overnight Motor Transportation Co. v. Missel, 316 U.S. 572; McComb v. Puerto Rico Tobacco Marketing Co-op Ass'n., 80 F. Supp. 953, affirmed, 181 F. 2d 697.) A workweek is a fixed and regularly recurring period of 7 consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. The workweek may not be changed for the purpose of evading the requirements of the Act.

§ 793.20 Exclusive engagement in exempt work.

An employee who engages exclusively in a workweek in work which is exempt under section 13(b)(9) is exempt from the Act's overtime requirements for the entire week.

§ 793.21 Exempt and nonexempt work.

Where an employee in the same workweek performs work which is exempt from the overtime requirements of the Act under section 13(b)(9), and also engages in work to which the overtime requirements apply, he is not exempt from overtime provisions of the Act in that week. (See McComb v. Puerto Rico Tobacco Marketing Co-op Ass'n., 80 F. Supp. 953, affirmed, 181 F. 2d 697; Mitchell v. Hunt, 263 F. 2d 913; Abram v. San Joaquin Cotton Oil Co., 46 F. Supp. 969; McComb v. del Valle, 80 F. Supp. 945; Walling v. Peacock Corp., 58 F. Supp. 880.) As explained in § 793.13, work which does not come within the occupational duties of an announcer, news editor, or chief engineer, or which is not related and incidental thereto, is not exempt work under section 13(b)(9). The mere isolated or occasional performance of insubstantial amounts of such nonexempt work will not defeat the exemption for the employee. Where, however, an employee, in a particular workweek, performs a substantial amount of nonexempt work to which the overtime provisions of the Act are applicable, the employee is not exempt under section 13(b)(9) in that workweek. For administrative purposes an employee who spends 20 percent or more of the hours he works in a workweek in such nonexempt work, will not be considered exempt under section 13(b)(9) in that workweek.

PART 794—PARTIAL OVERTIME EXEMPTION FOR EMPLOYEES OF WHOLESALE OR BULK PETROLEUM DISTRIBUTORS UNDER SECTION 7(b)(3) OF THE FAIR LABOR STANDARDS ACT

Subpart A—General

Sec.

794.1 General scope of the Act.
794.2 Purpose of this part.
794.3 Matters discussed in this part.
794.4 Significance of official interpretations.
794.5 Basic support for interpretations.
794.6 Reliance on interpretations.
794.7 Interpretations made, continued, and superseded by this part.

Subpart B—Exemption From Overtime Pay Requirements Under Section 7(b)(3) of the Act

SCOPE AND APPLICATION IN GENERAL

794.100 The statutory provision.
794.101 Intended scope of exemption.
794.102 Guides for construing exemptions.
794.103 Dependence of exemption on engagement in described distribution.
794.104 Enterprises engaged in described distribution and in other activities.
794.105 Other requirements for exemption.

THE "ENTERPRISE"

794.106 Statutory definition of "enterprise."
794.107 "Establishment" distinguished.
794.108 Scope of enterprise must be known before exemption tests can be applied.
794.109 Statutory basis for inclusion of activities in enterprise.
794.110 Activities excluded from the enterprise by the statute.
794.111 General characteristics of the statutory enterprise.

"INDEPENDENTLY OWNED AND CONTROLLED LOCAL ENTERPRISE"

Sec.

794.112 Only independent and local enterprises qualify for exemption.
794.113 The enterprise must be "local."
794.114 The enterprise must be "independently owned and controlled."
794.115 "Independently owned."
794.116 "Independently * * * controlled."
794.117 Effect of franchises and other arrangements.
794.118 Effect of unrelated activities.

ANNUAL GROSS VOLUME OF SALES

794.119 Dependence of exemption on sales volume of the enterprise.
794.120 Meaning of "annual gross volume of sales."
794.121 Exclusion of excise taxes.
794.122 Ascertainment of "annual" gross sales volume.
794.123 Method of computing annual volume of sales.
794.124 Computations on a fiscal year basis.
794.125 Grace period of 1 month for compliance.
794.126 Computations for a new business.

SALES MADE WITHIN THE STATE

794.127 Exemption conditioned on making 75 percent of sales within the State.
794.128 Sales made to out-of-State customers.
794.129 Sales "made within the State" not limited to noncovered activity.

SALES MADE TO OTHER BULK DISTRIBUTORS

794.130 Not more than 25 percent of sales may be to customers engaged in bulk distribution of petroleum products for resale.
794.131 "Customer * * * engaged in bulk distribution."
794.132 "Petroleum products."
794.133 "Bulk" distribution.
794.134 Distribution "for resale."

APPLICATION OF EXEMPTION TO EMPLOYEES

794.135 Employees who are exempt.
794.136 Employees whose activities may qualify them for exemption.
794.137 Effect of activities other than "wholesale or bulk distribution of petroleum products."
794.138 Workweek unit in applying the exemption.
794.139 Exempt and nonexempt activities in the workweek.
794.140 Compensation requirements for a workweek under section 7(b)(3).

BEST DOCUMENT AVAILABLE

Sec.
794.141 Workweeks when hours worked do not exceed 12 in any day or 56 in the week; compensation requirements.
794.142 Special compensation when overtime in excess of 12 daily or 56 weekly hours is worked in the workweek.
794.143 Work exempt under another section of the Act.

RECORDS TO BE KEPT BY EMPLOYERS

794.144 Records to be maintained.

AUTHORITY: Secs. 1-19, 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

SOURCE: 35 FR 16510, Oct. 22, 1970, unless otherwise noted.

Subpart A—General

§ 794.1 General scope of the Act.

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, is a Federal statute of general application which establishes minimum wage, overtime pay, equal pay and child labor requirements that apply as provided in the Act. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 794.2 Purpose of this part.

This Part 794 constitutes the official interpretation of the Department of Labor with respect to the meaning and application of section 7(b)(3) of the Act. This section provides a limited partial exemption from the overtime provisions of section 7 of the Act (but not from the minimum wage, child labor, equal pay, or recordkeeping provisions) with respect to employees of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products, if the enterprise meets certain specified conditions. This exemption was added to the Act by the 1966 Amendments, which repealed a complete overtime exemption previously available for employees of such enterprises (sec. 13(b)(10) of the Act as amended in 1961). It is the purpose of this part to make available in one place the interpretations of the law governing this exemption which will guide the Secretary of Labor and the Administrator in the performance of their duties under the Act.

§ 794.3 Matters discussed in this part.

This part primarily discusses the meaning and application of the section 7(b)(3) exemption. The meaning and application of other provisions of the Fair Labor Standards Act are discussed only to make clear their relevance to the 7(b)(3) exemption and are not considered in detail in this part. Interpretations published elsewhere in this title deal with such subjects as the general coverage of the Act (Part 776 of this chapter), methods of payment of wages (Part 531, Subpart C, of this chapter), computation and payment of overtime compensation (Part 778 of this chapter), computation and payment of overtime compensation (Part 778 of this chapter), retailing of goods or services (Part 779 of this chapter), hours worked (Part 785 of this chapter), and child labor provisions (Part 570 of this chapter). Regulations on recordkeeping are contained in Part 516 of this chapter, and regulations defining exempt bona fide executive, administrative, and professional employees are contained in Part 541 of this chapter. The equal pay provisions are discussed in Part 800 of this chapter. Regulations and interpretations on other subjects concerned with the application of the Act are listed in the table of contents to this chapter. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

BEST DOCUMENT AVAILABLE

§ 794.4 Significance of official interpretations.

The interpretations of the law contained in this part are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. These interpretations indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon re-examination of an interpretation, that it is incorrect. The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met in the consideration of the exemption discussed. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210 or to any Regional or Area Office of the Division.

§ 794.5 Basic support for interpretations.

The ultimate decisions on interpretations of the Act are made by the courts (Mitchell v. Zachry, 362 U.S. 310; Kirschbaum v. Walling, 316 U.S. 517). Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (Skidmore v. Swift, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Plan 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 F.R. 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

§ 794.6 Reliance on interpretations.

As previously stated, the interpretations of the law contained in this part are official interpretations. So long as they remain effective and are not modified, amended, rescinded or determined by judicial authority to be incorrect, they may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (63 Stat. 910, 29 U.S.C. 251 et seq., discussed in Part 790 of this chapter). In addition, the Supreme Court has recognized that such interpretations of this Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Further, as stated by the Court: "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (Skidmore v. Swift, 323 U.S. 134).

§ 794.7 Interpretations made, continued, and superseded by this part.

On and after publication of this part in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended by the Fair Labor Standards Amendment of 1966 and which were in effect at the time of such publication are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn.

Subpart B—Exemption From Overtime Pay Requirements Under Section 7(b)(3) of the Act

SCOPE AND APPLICATION IN GENERAL

§ 794.100 The statutory provision.

Section 7(b)(3) of the Act provides a partial exemption from the overtime pay requirements of section 7 (but not from the minimum wage, equal pay or child labor requirements) for any employee employed

by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) The annual gross volume of sales of such enterprise is less than $1 million exclusive of excise taxes;

(B) More than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) Not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of 40 hours in any workweek at a rate not less than one and one-half times the minimum wage applicable to him under section 6, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

§ 794.101 Intended scope of exemption.

Under section 7(b)(3) of the Act, the intent of the exemption must be given effect in determining the scope of its application to an enterprise and to the employees of an enterprise. The statutory language must be applied to the facts in a manner consistent with the purpose of the exemption as evidenced by its legislative history. This purpose is to relieve the described enterprises from the application of the Act's general overtime pay requirements (in the limited manner specified in the exemption) to employment in their activities of distributing petroleum products. Such employment was stated to be affected by climatic, seasonal, and other pertinent factors characteristic of business operations in the distribution of such products. (See, in this connection, the following documents of 87th Cong., first sess.; H. Rept. No. 75, pp. 26, 27, 36; 105 Congressional Record (daily edition) p. 4519; S. Rept. No. 145, pp. 37, 50; H. Rept. No. 327, p. 18; Hearings before Senate Subcommittee on Labor on S. 256, S. 879, and S. 895, at pp. 411-424; Hearings before House Special Subcommittee on Labor on H.R. 2935, at pp. 422-425 and 627-629; and these documents of the 89th Cong., second sess.; H. Rept. No. 1366, pp. 12, 13, and 43; Cong. Record (daily edition) p. 10745; S. Rept. No. 1487, pp. 32 and 51.)

§ 794.102 Guides for construing exemptions.

It is judicially settled that "The details with which the exemptions in this Act have been made preclude their enlargement by implication" and "no matter how broad the exemption, it is meant to apply only to" the employment specified in the statute. Conditions specified in the language of the Act are "explicit prerequisities to exemption." Accordingly, it is the well-established rule that exemptions from the Act "are to be narrowly construed against the employer seeking to assert them" and their applications is limited to those who come "plainly and unmistakably within their terms and spirit." An employer who claims such an exemption has the burden of showing that it applies. See Wirtz v. Lunsford, 404 F. 2d 693 (C.A. 6); Addison v. Holly Hill, 322 U.S. 607; Maneja v. Waialua, 349 U.S. 254; Phillips v. Walling, 334 U.S. 490; Arnold v. Kanowsky, 361 U.S. 388; Mitchell v. Kentucky Finance Co., 359 U.S. 290; Walling v. General Industries Co., 330 U.S. 545.

§ 794.103 Dependence of exemption on engagement in described distribution.

By its terms, section 7(b)(3) provides a partial and contingent exemption from the general overtime pay requirements of the act applicable to "any employee * * * employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum product * * *." Thus, engagement in the described distribution is an "explicit prerequisite to exemption" (Arnold v. Kanowsky, 361 U.S. 388), as are the other express conditions set forth in the section. A natural reading of the statutory language suggests that the employee as well as the enterprise must be so engaged in order for the exemption to apply (see Porto Rico Light Co. v. Mor, 253 U.S. 345). To the extent that its employees are engaged in the described distribution, the enterprise is itself so engaged (see Kirshbaum v. Walling, 316 U.S. 517; and see § 794.104). Also, whenever an enterprise is so engaged, any of its employees will be considered to be "employed by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products" if the duties of his employment require him to perform any operations or provide any services in carrying on such activities of his employer, and if the employee is not engaged in a substantial portion of his workweek in other activities which do not provide a basis for exemption under section 7(b)(3). Such an interpretation of the quoted language is believed necessary to give effect to the intended scope of the exemption as explained in § 794.101. Where an enterprise is exclusively engaged in the wholesale or bulk distribution of petroleum products and meets all the other requirements of section 7(b)(3), all of its employees who are paid for their hours of work in accordance with section 6 of the Act and the special pay provisions of section 7(b)(3) (see § 778.602 of this chapter and §§ 794.135 through 794.136) will be exempt from the overtime pay requirements of the Act under the principles stated above. What products are included in the term "petroleum products" and what constitutes the "bulk distribution" of such products within the meaning of section 7(b)(3) are discussed in §§ 794.132-794.133.

§ 794.104 Enterprises engaged in described distribution and in other activities.

An enterprise may be engaged in the wholesale or bulk distribution of petroleum products, within the meaning of section 7(b)(3), without being exclusively so engaged. Such engagement may be only one of the several related activities, performed through unified operation or common control for a common business purpose, which constitute the enterprise (see § 794.106) under section 3(r) of the Act. If engaging in such distribution is a regular and significant part of its business, an enterprise which meets the other tests for exception under section 7(b)(3) will be relieved of overtime pay obligations with respect to employment of its employees in such distribution activities, in accordance with the intended scope (see § 794.101) of the exemption. The same will be true with respect to employment of its employees in those related activities which are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. There is no requirement that engaging in such activities constitute any particular percentage of the enterprises's business. However, in the case of an enterprise engaged in other activities as well as in the wholesale or bulk distribution of petroleum products (including related activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), an employee employed in such other activities of the enterprise is not engaged in employment which the exemption was intended to reach (see § 794.101). Such an employee is not brought within the exemption by virtue of the fact that the enterprise by which he is employed is engaged with other employees in the distribution activities described in section 7(b)(3). This accords with the judicial construction of other exemptions in the Act which are similarly worded.

See Connecticut Co. v. Walling, 154 F. 2d 522, Certiorari denied, 329 U.S. 667; Northwest Airlines v. Jackson, 185 F. 2d 74; Davis v. Goodman Lumber Co., 133 F. 2d 52; Fleming v. Swift & Co., 41 F. Supp. 825, aff'd 131 F. 2d 249.

§ 794.105 Other requirements for exemption.

The limited overtime pay exemption provided by section 7(b)(3) applies to any employee compensated in accordance with its terms who is "employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products" as explained in §§ 794.103-794.104 if the enterprise which employs him meets all of the following requirements: (a) It is a "local" enterprise; (b) it is "independently owned and controlled"; (c) it has an annual gross volume of sales of less than $1 million exclusive of excise taxes; (d) it makes more than 75 percent of its annual dollar volume of sales within the State in which it is located; and (e) not more than 25 percent of such annual dollar volume of sales is to customers who are engaged in the bulk distribution of petroleum products for resale. In order to determine whether all these requirements are met, it is necessary to know what constitutes the "enterprise" to which reference is made, the meaning of "the wholesale or bulk distribution of petroleum products" in which engagement is required as a prerequisite to exemption, what is meant by a "local" enterprise and what characterizes it as "independently owned and controlled", and the criteria for application of the dollar volume tests. These matters will be discussed in some detail in the sections following.

THE "ENTERPRISE"

§ 794.106 Statutory definition of "enterprise."

The term "enterprise" is defined in section 3(r) of the Act. That definition (insofar as it affects a wholesale or bulk petroleum distributor) is as follows:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

§ 794.107 "Establishment" distinguished.

The "enterprise" referred to in the section 7(b)(3) exemption is to be distinguished from an "establishment". As used in the Act, the term "establishment", which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. (See Phillips v. Walling, 324 U.S. 490; Mitchell v. Bekins Van & Storage Co., 352 U.S. 1027; 95 Congressional Record 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., first session, p. 25.) It will be noted from the definition of "enterprise" in section 3(r), as set forth in § 794.106, that the activities of the enterprise may be "performed in one or more establishments," and section 7(b)(3) specifies that the enterprises to which its exemption requirements are applicable will include "an enterprise with more than one bulk storage establishment."

§ 794.108 Scope of enterprise must be known before exemption tests can be applied.

The scope of the "enterprise" as defined by section 3(r) of the Act must be ascertained before it is possible to apply the tests for exemption contained in section 7(b)(3) which are based on the dollar volume of sales of the "enterprise". The activities included in the enterprise must be known, and any activities not a part of the enterprise must be excluded before the dollar volume of sales derived from the activities of the enterprise can be computed.

§ 794.109 Statutory basis for inclusion of activities in enterprise.

The "enterprise" for purposes of enterprise coverage under section 3(s) and the exemption provision in section 7(b)(3), is defined in section 3(r) (§ 794.106) in terms of the activities in which it is engaged. All the "related activities" which are "performed * * * by any person or persons for a common business purpose" are included if they are performed "either through unified operation or common control." This is true even if they are performed by more than one person, or in more than one establishment or by more than one corporate or other organizational unit. The definition specifically includes as a part of the enterprise, departments of an establishment operated through leasing arrangements. These statutory criteria are discussed in more detail in subsequent sections.

§ 794.110 Activities excluded from the enterprise by the statute.

The circumstances under which certain activities will be excluded from the "enterprise" referred to in the Act are made clear by the definition quoted in § 794.106. The definition distinguishes between the related activities performed through unified operation and common control for a common business purpose by the participants in the enterprise, and activities which are related to these activities but are performed for the enterprise by a bona fide independent contractor (for example, an independent accounting or auditing firm). The latter activities are expressly excluded from the "enterprise" as defined. In addition, the definition contains a proviso detailing certain circumstances under which a retail or service establishment under independent ownership will not lose its status as a separate and distinct enterprise by reason of certain franchise and other arrangements which it may enter into with others. This proviso, the effect of which is more fully explained in Parts 776 and 779 of this chapter, may be important to wholesale or bulk distributors of petroleum products in determining whether the effect of particular arrangements which they may make with retailers of their products will be to include activities of the latter with their own activities in the same enterprise for purposes of the Act.

§ 794.111 General characteristics of the statutory enterprise.

As defined in the Act, the term "enterprise" is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide. The enterprise, however, is not necessarily coextensive with the entire business activities of an employer. The enterprise may consist of a single establishment which may be operated by one or more employers; or it may be composed of a number of establishments which may be operated by one or more employers. On the other hand, a single employer may operate more than one enterprise. The Act treats as separate enterprises different businesses which are unrelated to each other and lack any common business purpose, even if they are operated by the same employer.

"INDEPENDENTLY OWNED AND CONTROLLED LOCAL ENTERPRISE"

§ 794.112 Only independent and local enterprises qualify for exemption.

The legislative history of the exemption (§ 794.101) shows that the proponents of an amendment to provide the relief which it grants from the overtime pay provisions of the Act were organizations of independent local merchants who did not as a rule engage extensively in interstate operations such as those typical of major oil companies, and who functioned primarily at the local level in distributing petroleum products at wholesale or in bulk.

As a result the exemption provided by the Act, like that requested, was limited to enterprises which are "local" (§ 794.113) and are "independently owned and controlled" (§§ 794.114-794.118).

§ 794.113 The enterprise must be "local."

It is clear from the language of section 7(b)(3) that the exemption which it provides is available to an enterprise only if it is a "local enterprise". The other tests of exemption must also, of course be met. A "local" enterprise is not defined in the Act, and the word "local", which appears in a different context elsewhere in the Act (see clause (2) of the last sentence of section 3(r) and sections 13(b)(7), 13(b)(11)), is likewise given no express definition. There is no fixed legal meaning of the term "local"; it is usually a flexible and comparative term whose meaning may vary in different contexts. As used here, certain guides are available from the context in which it is used, the legislative history surrounding adoption of section 7(b)(3), and the law of which it forms a part. A "local" enterprise engaged in the wholesale or bulk distribution of petroleum products is clearly intended to embrace the kind of enterprise operated by the merchants who requested the amendment; that is, one which provides farmers, homeowners, country merchants, and others in its locality with petroleum products in bulk quantities or at wholesale. The language of section 7(b)(3) makes it clear also that the enterprise will not be regarded as other than "local" merely because it has more than one bulk storage establishment. On the other hand, the section makes it equally clear that ordinarily an enterprise which is not located within a single State is not a local enterprise of the kind to which the exemption will apply. This follows from the express requirement that more than 75 percent of the enterprise's annual dollar volume of sales must be made "within the State in which such enterprise is located." The legislative history provides further evidence of this intent. At the hearings before the Senate Labor Subcommittee a proponent of the amendment which eventually was enacted in somewhat different language (sec. 13(b)(10) of the Act which was repealed by the 1966 Amendments to the Act and replaced by section 7(b)(3)), stated with respect to the significance of the word "local":

> * * * the language which we have suggested in the proposed amendment "locally owned and controlled establishments", I admit that can point up some trouble and make some work for lawyers.
>
> We, however, in our endeavor to show our sincerity of only trying to cover local intrastate establishments, went overboard on this language.
>
> You will note that 75 percent of our business has to be performed in one State. I think that "locally owned and controlled establishments" language should better read "independently owned and controlled local enterprises or establishment." (Sen. Hearings on amendments to the Fair Labor Standards Act, 87th Cong., first session, p. 416.)

The same witness also quoted from the Congressional Record of August 18, 1960, the discussion in the course of the consideration of the amendments to the Act by the Senate during the 86th Congress, second session, as follows:

> These wholesale and bulk distributors of petroleum products, commonly referred to as oil jobbers, are primarily local businessmen who acquire these products from their suppliers' bulk terminal in the State in which the jobber does business and sell these products to service stations, farmers, and homeowners in the State in which they maintain their place of business * * * I am advised that 98.3 percent of all the oil jobbers in the United States sell their products only in the State in which their place of business is located thus qualifying by any definition as local merchants. (Sen. Hearings on amendments to the Fair Labor Standards Act 87th Cong., first session, pp. 415-416.)

It thus appears that the word "local" was intended to confine the exemption to enterprises of such local merchants. The enterprise need not, of course, conduct all of its business within the State in which it is physically located, since the exemption specifically provides that it may make a portion of its sales outside the State in which it is located.

§ 794.114 The enterprise must be "independently owned and controlled."

Another requirement for exemption under section 7(b)(3) is that the enterprise must be "independently owned and controlled". Since this requirement is in the conjunctive, it must be established that the enterprise which is engaged in the wholesale or bulk distribution of petroleum products is both independently owned and independently controlled. (*Wirtz* v. *Lunsford*, 404 F. 2d 693 (C.A. 6).) At the hearing before the Senate Labor Subcommittee, when the amendment was proposed which eventually was incorporated in the Act as section 13(b)(10) by the 1961 amendments (later repealed by the 1966 amendments to the Act and replaced by section 7(b)(3)), a spokesman for proponents of the amendment made the following statement, which bears on this requirement for exemption:

> The designation "independent" as applied to an oil jobber means that he owns his own office, bulk storage, and delivery facilities; pays his own personnel, and in all respects conducts his business as any other independent businessman.
>
> It also means that the jobber is not a subsidiary of nor controlled by any so-called major oil company, although the jobber may sell the branded products of such a company.
>
> Some jobbers own service stations which they lease to independent dealers and a small percentage of jobbers may operate one or more service stations with their own salaried personnel. (Senate Hearings on the Amendments to the Fair Labor Standards Act, 87th Cong., first session, p. 411.)

It appears, therefore, that the purpose of the requirement limiting the exemption to the enterprises which are "independently owned and controlled," is to confine the exemption to those petroleum jobbers who own their own facilities and equipment and who are not subsidiaries nor controlled by any producer, refinery, terminal supplier or so-called major oil company. (See *Wirtz* v. *Lunsford*, cited above.) The fact that the petroleum jobber sells a branded product of a major oil company will not, of itself, affect the status of his enterprise as one which is "independently owned and controlled". So also the fact that the jobber owns gasoline service stations, which he leases or which he operates himself, will not affect the status of his enterprise as being "independently owned and controlled".

§ 794.115 "Independently owned."

Ownership of the enterprise may be vested in an individual petroleum jobber, or a partnership, or a corporation, so long as such ownership is not shared by a major oil company, or other producer, refiner, distributor or supplier of petroleum products, so as to affect the independent ownership of the enterprise. As noted in § 794.114, an enterprise will not be considered independently owned where it does not own its own office, bulk storage, and delivery facilities. The enterprise may also not be considered "independently owned" where it does not own its stock-in-trade. (See *Wirtz* v. *Lunsford*, 404 F.2d 693 (C.A. 6).) It is recognized that, in the ordinary course of business dealings, an independently owned enterprise may purchase its goods on credit and this, of course, will not affect its characterization as being "independently owned" within the meaning of the exemption. However, there may well be a question as to whether the enterprise is "independently owned" where the enterprise receives its petroleum products on consignment and the supplier lays claim to the ownership of the account receivable. Of possible relevance also is the intent evident in the statutory language to provide exemption only for an enterprise which can meet the specified tests which depend on "the sales of such enterprise." The determination in such cases, as in other cases involving questions of independent ownership, will necessarily depend on all the facts.

§ 794.116 "Independently * * * controlled."

As explained in § 794.114, the enterprise in addition to being independently owned must also be "independently controlled." The test here is whether the individual, partnership, or corporation which owns the enterprise also controls the enterprise as an independent businessman, free of control by any so-called major oil company or other person engaged in the petroleum business. Control by others may be evidenced by ownership; but control may exist in the absence of any ownership. For example where an enterprise engaged in the wholesale or bulk distribution of petroleum products enters into franchise or other arrangements which have the effect of restricting the products it distributes, the prices it may charge, or otherwise controlling the activities of the enterprise in those respects which are the common attributes of an independent businessman, these facts may establish that the enterprise is not "independently controlled" as required by the exemption under section 7(b)(3). (*Wirtz* v. *Lunsford*, 404 F. 2d 693 (C.A. 6).)

§ 794.117 Effect of franchises and other arrangements.

Whether a franchise or other contractual arrangement affects the status of the enterprise as "an independently owned and controlled * * * enterprise," depends upon all the facts including the terms of the agreements and arrangements between the parties as well as the other relationships that have been established. The term "franchise" is not susceptible of precise definition. While it is clear that in every franchise a business surrenders some rights, it is equally clear that every franchise does not necessarily deprive an enterprise of its character as an independently owned and operated business. This matter was the subject of legislative consideration in connection with other provisions of the 1961 amendments to the Act. The Senate Report on the amendments, in discussing the effects of franchises and similar arrangements on the scope of the "enterprise" under section 3(r) of the Act, stated as follows:

> There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?"
>
> * * * * *
>
> In all of these cases if it is found on the basis of all the facts and circumstances that the arrangements are so restrictive as to products, prices, profits, or management as to deny the "franchised" establishment the essential prerogative of the ordinary independent businessman, the establishment, the dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, rights or concession. (S. Rep. 145, 87th Cong., first session, p. 42.)

Thus there may be a number of different types of arrangements established in such cases and the determination as to whether the arrangements have the effect of depriving the enterprise of its independent ownership or control will necessarily depend on all the facts. The fact that the distributor hires and controls the employees engaged in distribution of the product does not establish the requisite independence of the distributor; it is only one factor to be considered (*Wirtz* v. *Lunsford*, 404 F. 2d 693 (C.A. 6).) Ultimately the determination of the precise scope of such arrangements and their effect upon the independent ownership and control of the enterprise under section 7(b)(3), as well as on the question whether such arrangements result in creating a larger enterprise, rests with the courts.

§ 794.118 Effect of unrelated activities.

The term "independently owned and controlled" has reference to independence of ownership and control by others. Accordingly, the fact that the petroleum jobber may himself engage in other businesses which are not related to the enterprise engaged in the wholesale or bulk distribution of petroleum products, will not affect the question whether the petroleum enterprise is independently owned or controlled. For example, the fact that the wholesale or bulk petroleum distributor also owns or controls a wholly separate tourist lodge enterprise or job printing business will not affect the status of his enterprise engaged in the wholesale or bulk distribution of petroleum products as an "independently controlled" enterprise.

ANNUAL GROSS VOLUME OF SALES

§ 794.119 Dependence of exemption on sales volume of the enterprise.

It is a requirement of the section 7(b)(3) exemption that the annual gross volume of sales of the enterprise must be less than $1 million exclusive of excise taxes. This dollar volume test is separate and distinct from the $250,000 annual gross volume (of sales made or business done) test in section 3(s)(1) of the Act. This latter test is for the purpose of determining coverage as an enterprise engaged in commerce or in the production of goods for commerce; whereas the $1 million test is for limiting the 7(b)(3) exemption to enterprises with annual sales of less than that amount.

§ 794.120 Meaning of "annual gross volume of sales."

The annual gross volume of sales of an enterprise consists of its gross receipts from all types of sales during a 12-month period (§ 794.122). The gross volume derived from all sales transactions is included, and will embrace among other things receipts from service, credit, or similar charges. However, credits for goods returned or exchanged (as distinguished from "trade-ins"), rebates, discounts, and the like are not ordinarily included in the annual gross volume of sales. In determining whether the million dollar limit on annual gross sales volume is or is not exceeded, the sales volume from all the related activities which constitute the enterprise must be included; the dollar volume of the entire business in all establishments is added together. Thus, the gross volume of sales will include the receipts from sales made by any gasoline service stations of the enterprise, as well as the sales made by any other establishments of the enterprise. These principles and their application are considered in more detail in Parts 776 and 779 of this chapter, which contain general discussions of "annual gross volume" as used in other provisions of the Act.

§ 794.121 Exclusion of excise taxes.

The computation of the annual gross volume of sales of the enterprise for purposes of section 7(b)(3) is made "exclusive of excise taxes." It will be noted that the excise taxes excludable under section 7(b)(3) are not, like those referred to in section 3(s)(1) and section 13(a)(2), limited to those "at the retail level which are separately stated." Under section 7(b)(3), therefore, all excise taxes which are included in the sales price may be excluded in computing the annual gross volume of the enterprise.

§ 794.122 Ascertainment of "annual" gross sales volume.

The annual gross volume of sales of an enterprise engaged in the wholesale or bulk distribution of petroleum products consists of its gross dollar volume of sales during a 12-month period. Where a computation of annual gross volume of sales is necessary to determine the status of the enterprise under section 7(b)(3) of the Act, it must be based on the most recent prior experience which it is practicable to use.

§ 794.123 Method of computing annual volume of sales.

(a) Where the enterprise, during the portion of its current income tax year up to the end of the current payroll period, has already had a gross volume of sales in excess of the amount specified in the statute, it is plain that its annual gross volume of sales currently is in excess of the statutory amount.

(b) Where the enterprise has not yet in such current year exceeded the statutory amount in its gross volume of sales, but has had, in the most recently ended year used by it for income tax purposes, a gross volume of sales in excess of the amount specified in the Act, the enterprise will be deemed to have an annual gross volume of sales in excess of such statutory amount, unless use of the method set forth in paragraph (c) of this section establishes a gross annual volume less than the statutory amount.

(c) When it is necessary to make a computation of the annual gross volume of sales of the enterprise the following method shall be used: At the beginning of each calendar quarter (Jan. 1-Mar. 31; Apr. 1-June 30; July 1-Sept. 30; Oct. 1-Dec. 31), the gross receipts from all of its sales during the annual period (12 calendar months) which immediately precedes the current calendar quarter, is totaled. In this manner the employer, by calculating the sales of his enterprise, will know whether or not the dollar volume tests have been met for the purpose of complying with the law in the workweeks ending in the current calendar quarter.

§ 794.124 Computations on a fiscal year basis.

Some enterprises operate on a fiscal year, consisting of an annual period different from the calendar year, for income tax or sales or other accounting purposes. Such enterprises in applying the method of computation in § 794.123(c) may use the four quarters of the fiscal period instead of the four quarters of the calendar year. Once adopted, the same basis must be used in subsequent calculations.

§ 794.125 Grace period of 1 month for compliance.

Where it is not practicable to compute the annual gross volume of sales under § 794.123 or § 794.124 in time to determine obligations under the Act for the current quarter, an enterprise may use a 1-month grace period. If this 1-month grace period is used, the computations made under those sections will determine its obligations under the Act for the 3-month period commencing 1 month after the end of the preceding calendar or fiscal quarter. Once adopted the same basis must be used for each successive 3-month period.

§ 794.126 Computations for a new business.

When a new business is commenced the employer will necessarily be unable for a time to determine its annual dollar volume on the basis of a full 12-month period as described in §§ 794.123 and 794.124. In many cases, it is readily apparent that the enterprise will or will not have the requisite annual dollar volume specified in the Act. For example, the new business may be so large that it is clear from the outset that the business will exceed the $1 million test of the exemption. In other cases, where doubt exists, the gross receipts of the new business during the first quarter year in which it has been in operation will be taken as representative of its annual dollar volume tests for purposes of determining its status under section 7(b)(3) of the Act in workweeks falling in the following quarter-year period. Similarly, for purposes of determining its status under the Act in workweeks falling within ensuing quarter-year periods, the gross receipts of the new business for the completed quarter-year periods will be taken as representative of its annual dollar volume in applying the annual volume tests of the Act. After the new business has been in operation for a full calendar or fiscal year, the analysis can be made by the methods described in §§ 794.123 and 794.124.

SALES MADE WITHIN THE STATE

§ 794.127 Exemption conditioned on making 75 percent of sales within the State.

A further requirement of the section 7(b)(3) exemption is that more than 75 percent of the sales of the enterprise engaged in the wholesale or bulk distribution of petroleum products (measured by annual dollar volume) must be made "within the State in which such enterprise is located." This means that over 75 percent of the annual dollar volume of sales must be from sales to customers within the same State in which the enterprise is located. If 25 percent or more of its sales volume is from sales to customers outside the State of its location, the requirement is not met and the enterprise cannot qualify for exemption.

§ 794.128 Sales made to out-of-State customers.

Whether the sale of goods or services is made to an out-of-State customer is a question of fact. In order for a customer to be considered an out-of-State customer, some specific relationship between him and the seller has to exist to indicate his out-of-State character. On the one hand, sales made to the casual cash-and-carry customer (such as at a gasoline station owned or operated by the enterprise), who, for all practical purposes, is indistinguishable from the mass of customers who visit the establishment, are sales made within the State even though the seller knows or has reason to believe, because of his proximity to the State line or because he is frequented by tourists, that some of the customers who visit his establishment reside outside the State. If the customer is of that type, sales made to him are sales made within the State even if the seller knows in the particular instance that the customer resides outside the State. On the other hand, a sale is made to an out-of-State customer and therefore, is not a sale made "within the State" in which the enterprise is located, if delivery of the goods is made outside that State, or if the relationship with the customer is such as to indicate his out-of-State character. Such a relationship would exist, for example, where an out-of-State company in the regular course of dealing picks up the petroleum products at the bulk storage station of the enterprise and transports them out of the State in its own trucks.

§ 794.129 Sales "made within the State" not limited to noncovered activity.

Sales to customers located in the same State as the establishment are sales made "within the State" even though such sales may constitute activity within the interstate commerce coverage of the Act, as where the sale (a) is made pursuant to prior orders from customers for goods to be obtained from outside the State; (b) contemplates the purchase of goods from outside the State to fill a customer's orders; or (c) is made to a customer for his use in interstate or foreign commerce or in the production of goods for such commerce.

SALES MADE TO OTHER BULK DISTRIBUTORS

§ 794.130 Not more than 25 percent of sales may be to customers engaged in bulk distribution of petroleum products for resale.

As a further requirement for exemption, section 7(b)(3) limits to not more than 25 percent (measured by annual dollar volume) the sales which an enterprise engaged in the wholesale or bulk distribution of petroleum products may make to customers who are engaged in the bulk distribution of such products for resale. It should be noted that this limitation does not depend on whether the goods sold by the enterprise to such customers are sold by it for resale, or on whether the goods sold to such customers are petroleum products. It is whether the customer is engaged in selling petroleum products for resale that is controlling. A sale of any goods must be included in this 25 percent limitation so long as it is made to a customer who, as described in section 7(b)(3), can be characterized as one "engaged in the bulk distribution of such products for resale". It should be also noted that this provision does not in any way limit the sales which the enterprise may make to customers who are not engaged in the bulk distribution of petroleum products for resale. Thus, there is no limitation on the sales the enterprise may make to gasoline service stations which sell such products for resale but do no engage in the "bulk distribution" of the products so sold, or to any other customers except those specified in the exemption in section 7(b)(3). Who is a "customer engaged in the bulk distribution of such products for resale" is discussed in §§ 794.131–794.133.

§ 794.131 "Customer * * * engaged in bulk distribution".

A sale to a customer of an enterprise engaged in the wholesale or bulk distribution of petroleum products will be considered to come within the 25 percent limitation for purposes of the exemption under section 7(b)(3) if it is made to a "customer who is engaged in the bulk distribution of such products for resale". The identity of such customers is generally well known in the trade. For example, this would generally include other petroleum jobbers, brokers, wholesalers, and any others who engaged in the bulk distribution of petroleum products for resale. Thus a sale to a petroleum jobber who is engaged in selling petroleum products to gasoline stations would clearly be a sale to a customer described in section 7(b)(3). The essential tests are: first, that the customer must be one who is engaged in the distribution of "such products", which means petroleum products; second, that he must engage in "the bulk distribution" of such products; and finally, that he must be engaged in such distribution "for resale". These three requirements are discussed in §§ 794.132 through 794.134.

§ 794.132 "Petroleum products".

A sale by an enterprise engaged in the wholesale or bulk distribution of petroleum products will be included in the 25 percent limitation under the exemption only if it is made to a customer who engages in the distribution, in bulk and for resale, of "petroleum products". The term "petroleum products" as used in section 7(b)(3) includes such products as gasoline, kerosene, diesel fuel, lubricating oils, fuel oils, greases, and liquified-petroleum gas. Sales to customers who are not engaged in the distribution of petroleum products will not be included in the 25 percent limitation.

§ 794.133 "Bulk" distribution.

"Bulk" distribution of petroleum products typically connotes those methods of distribution in which large quantities of the product are distributed in a single delivery or delivery trip. Thus, "bulk" distribution includes deliveries from bulk storage facilities at the establishment to the tank truck of a customer (whether or not at "wholesale"). It also includes deliveries made in series on a single trip on a delivery route to the storage tanks or facilities of a number of customers from a bulk supply of the product transported by tank truck, motor transport, or other motor carrier operated by the enterprise. Such deliveries are to be contrasted with such typical small-quantity individual deliveries as those made into the tank of a motor vehicle for use in its propulsion.

§ 794.134 Distribution "for resale."

A sale made to a customer engaged in the bulk distribution of petroleum products will be included in the 25 percent limitation only if the customer engages in the bulk distribution of petroleum products "for resale". Except with respect to a specific exclusion in section 3(n) regarding certain building materials, the word "resale" is not defined in the Act. The common meaning of "resale" is the act of "selling again". A sale is made for resale when the seller knows or has reasonable cause to believe that what is sold by him will be resold by the purchaser in the same or a different form. Where the sale is thus made for resale, it does not matter what ultimately happens to the subject of the sale. Thus, the fact that goods sold for resale are consumed by fire or no market is found for them and they are therefore never resold does not alter the character of the sale which is made for resale. In considering whether there is a sale of petroleum products for resale in any specific situation, the term "sale" includes, as defined in section 3(k) of the Act, "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

APPLICATION OF EXEMPTION TO EMPLOYEES

§ 794.135 Employees who are exempt.

If an enterprise engaged in distribution of petroleum products satisfies all the conditions specified in section 7(b)(3) as previously discussed, the partial exemption provided by this section from the Act's general overtime pay requirements will be applicable to all employees employed by their employer in activities of the enterprise for which the exemption was intended if, but only if, such employees are compensated in accordance with the compensation requirements of section 7(b)(3) (see § 794.100).

§ 794.136 Employees whose activities may qualify them for exemption.

The activities for which the section 7(b)(3) partial exemption was intended are discussed generally in §§ 794.103-794.104. In accordance with the principles there set forth, those employees employed in an enterprise which qualifies for application of the exemption, who are engaged in the storage and delivery of petroleum products for the enterprise, and those employees whose work is required for the performance of the activities in the wholesale or bulk distribution of the petroleum products or the related activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distributes such products, are employees for whom the employer may take the exemption provided they are paid in accordance with the special compensation provisions of section 7(b)(3). Thus, so long as these payment requirements are met, the exemption is applicable not only to such employees as drivers, helpers, loaders, dispatchers, and warehousemen engaged in the bulk delivery and storage of petroleum products, but also to such employees as office, management, and sales personnel, maintenance, custodial, protective personnel, and any others, who engage in related functions customarily carried on by such enterprises in the industry in conjunction with the wholesale and bulk distribution of the petroleum products.

§ 794.137 Effect of activities other than "wholesale or bulk distribution of petroleum products."

As previously noted, in some cases the related activities performed through unified operation or common control for a common business purpose which are included in the enterprise under the definition in section 3(r) of the Act may include activities other than the wholesale or bulk distribution of petroleum products. Examples are tire recapping or gasoline station services, the sale and servicing of oil burners, or the distribution of coal, ice, feed, building supplies, paint, etc. In some instances, as in the case of oil-burner servicing, these other activities are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. As indicated in § 794.104, employees of the enterprise who engage in such activities are within the general scope of the exemption. However, activities which are not customary practices of enterprises in the industry of wholesale or bulk distribution of petroleum products are not within the scope of the intent of the section 7(b)(3) exemption. For example, construction activities, operation of a sporting goods store, scrap paper and metal activities, the operation of a general repair garage, etc., are not the type of activities for which the section 7(b)(3) exemption was intended. Thus, where an enterprise engaged in the wholesale or bulk distribution of petroleum products operates a general repair garage, a mechanic servicing the automobiles and trucks brought to the garage by customers will not for that reason be within the exemption provided by section 7(b)(3), although the exemption provided by section 13(a)(2) may apply to him if the garage qualifies as an exempt retail or service establishment under the tests provided in that section of the Act. On the other hand, mechanics employed by an enterprise engaged in the wholesale or bulk distribution of petroleum products for the purpose of keeping the distribution equipment of the enterprise in good repair would come within the 7(b)(3) exemption.

§ 794.138 Workweek unit in applying the exemption.

(a) As is true generally with respect to provisions of the Act concerning compensation for overtime hours of work (see §§ 778.100-778.105 of this chapter, *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572), the unit of time to be used in determining the application of all provisions of the section 7(b)(3) exemption to an employee is the workweek. As defined in § 778.105 of this chapter, an employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It may begin at any hour of any day set by the employer and need not coincide with the calendar week. Once the workweek has been set it commences each succeeding week on the same day and at the same hour. Changing the workweek for the purpose of escaping the requirements of the Act is not permitted.

(b) By its terms (§ 794.100), section 7(b)(3) exempts an employer from any statutory responsibility he might otherwise have for a violation of section 7(a) of the Act "by employing any employee for a workweek in excess of that specified in such subsection" without paying the overtime compensation prescribed therein, "if such employee is so employed * * * by an * * * enterprise" qualifying under section 7(b)(3) for application of its provisions to such employment and if such employee receives the compensation which section 7(b)(3) requires. Accordingly, for section 7(b)(3) to apply to any workweek when an employee is employed for hours in excess of those specified in section 7(a), it must be established that in such workweek he is employed by his employer in the exempt activities of an enterprise described in section 7(b)(3) and that the compensation received by him for his work in such workweek satisfies the special pay requirements of section 7(b)(3).

§ 794.139 Exempt and nonexempt activities in the workweek.

The general nature of the activities of a wholesale or bulk petroleum distribution enterprise in which an employee must be engaged in order to come within the intent of the section 7(b)(3) exemption is discussed in §§ 794.136 through 794.137. In each case where an employee of the enterprise is engaged for a substantial portion of his workweek in activities which do not appear to be a part of the wholesale or bulk distribution of petroleum products, it will be necessary to examine such activities and the manner and extent of their performance to determine whether they are included in or are foreign to the activities customarily performed as an incident to or in conjunction with such distribution in the enterprises of the industry which distributes such products. If they are foreign to the activities thus customarily performed, engagement in them by the employee for a substantial portion of his workweek will render section 7(b)(3) inapplicable to him for that workweek. On the other hand, where an employee, who is otherwise engaged in the exempt activities (the wholesale or bulk distribution of petroleum products, including activities which are a necessary part thereof, and in activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), devotes an insubstantial amount of time (for administrative purposes, not more than 20 percent in a workweek) to these foreign activities, the section 7(b)(3) exemption will not for that reason be considered inapplicable to him.

§ 794.140 Compensation requirements for a workweek under section 7(b)(3).

(a) Exemption of an employee in any workweek under section 7(b)(3) is expressly conditioned on and limited by the special compensation provisions which it contains. These are set forth in full text in § 794.100. They require payment to the employee of compensation at specified rates for certain periods within the workweek when such periods are included in his hours of work. Their application requires an increase of at least 50 percent in the minimum wage rate otherwise applicable to the employee in such workweek "for employment in excess of forty hours" and, in addition, if such employment is "in excess of twelve hours in any workday, or * * * in excess of fifty-six hours in any workweek, as the case may be," the employee must be paid overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in the workweek in excess of the specified daily standard or in excess of the specified weekly standard, whichever is the greater number of overtime hours. The sections following discuss separately the application of these provisions to workweeks when the employee's hours of work do not exceed the daily or weekly standard specified in section 7(b)(3), and to workweeks when hours in excess of the daily or the weekly standard are worked.

(b) The special compensation requirements of section 7(b)(3) apply to an employee otherwise eligible for the exemption whenever he works more than 40 hours in a workweek for an enterprise described in and operating under this subsection. In any workweek in which the employee does not work more than 40 hours for his employer only the minimum wage requirements of section 6 are applicable. This is because section 7(b)(3) operates only as an exemption from the requirement of section 7(a) that compensation at a rate not less than one and one-half times the employee's regular rate must be paid for all hours worked by him in excess of 40 in the workweek. (This general 40-hour workweek standard has been applicable since Feb. 1, 1969, to all employment within the general coverage of the Act, regardless of whether any overtime pay requirements were previously applicable to such employment before the provisions added by the Fair Labor Standards Amendments of 1966 became effective.)

§ 794.141 Workweeks when hours worked do not exceed 12 in any day or 56 in the week; compensation requirements.

(a) The overtime pay exemption provided by section 7(b)(3) is "limited to 12 hours a day and 56 hours a week" in any workweek; the exemption is provided "for employment up to 12 hours in any workday and up to 56 hours in any workweek" without any payment for overtime hours at one and one-half times the regular rate being required. However, the exemption from any such time-and-one-half payment is limited to workweeks when "no more" than the specified hours are worked and is contingent on payment to the employee in such a workweek of "compensation for hours between 40 and 56" at a rate "not less than one and one-half times the applicable minimum wage." (H. Rept. No. 1366, pp. 12-13, 43, and S. Rept. No. 1487, p. 32, 89th Cong., second sess.) Thus, the exemption will be applicable to an employee otherwise eligible under the principles previously discussed in this part in any workweek when his hours of work do not exceed 12 in any day or 56 in the week if, and only if, his "compensation for employment in excess of forty hours" is "at a rate not less than one and one-half times the minimum wage rate applicable to him under section 6", as provided in section 7(b)(3). This means that in addition to the requirement of section 6, under which the first 40 hours of work must be paid for at a rate not less than the minimum hourly wage rate therein specified, the compensation requirements applicable to such an employee for whom the 7(b)(3) exemption is claimed include any increase in his regular straight-time pay rate for the hours worked in excess of 40 which may be necessary in order to raise the wage rate for such hours to a level of 50 percent above the rate required under section 6. Of course, if the employee is employed at a regular straight-time rate for all his hours of work which is as great or greater than one and one-half times the minimum wage applicable to him under section 6, no increase for the hours in excess of 40 will be required under the provisions of section 7(b)(3).

(b) The general minimum wage rate applicable to employees in employment that was subject to the minimum wage provisions of the Act prior to the effective date of the Fair Labor Standards Amendments of 1966 is $1.60 an hour. Under section 7(b)(3) an employee of a wholesale or bulk petroleum products distributor to whom this rate is applicable must be paid at least $2.40 an hour for hours worked in excess of 40 in the workweek in order for the exemption to apply. Many employees of such distributors are subject to the $1.60 minimum wage rate under section 6 either because they are traditionally covered as employees individually engaged in commerce or in the production of goods for commerce as defined in the Act or because the enterprise coverage provisions in effect prior to the 1966 amendments (applicable to enterprises with an annual gross volume of $1 million or more including excise taxes) would subject their employment to the minimum wage provisions if the 1966 amendments had not been enacted. In the case, however, of an employee of such a distributor whose employment comes within the minimum wage provisions only because of the 1966 amendments (which reduced the annual gross volume for covered enterprises to $500,000 on Feb. 1, 1967, and to $250,000 on Feb. 1, 1969, exclusive of specified separately stated excise taxes at the retail level), the minimum wage rate applicable under section 6 was $1.30 an hour until February 1, 1970, when it increased to $1.45 an hour. Beginning February 1, 1971, the minimum wage rate applicable to such an employee will be the same ($1.60 an hour) as that presently applicable to employment covered by the provisions of the prior Act. For employees subject to the $1.30 minimum wage rate the rate required for work over 40 hours under section 7(b)(3) was accordingly $1.95 an hour; for those subject to the $1.45 rate beginning February 1, 1970, such rate is $2.175. A discussion of the present and prior coverage of the Act will be found in Part 776 of this chapter, when a revision of such part discussing enterprise coverage is published.

§ 794.142 Special compensation when overtime in excess of 12 daily or 56 weekly hours is worked in the workweek.

(a) As noted in § 794.141, the partial exemption provided by section 7(b)(3) from the requirement that overtime hours be paid for at not less than one and one-half times the employee's regular rate applies only to "employment up to 12 hours in any workday and up to 56 hours in any workweek." The statute makes it plain that in any workweek when an employee otherwise eligible for the exemption works more than the specified daily or weekly hours the exemption applies only "if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." Failure of the employer to pay overtime compensation under these special standards defeat the exemption. (See *Wirtz* v. *Osceola Farms Co.*, 372 F. 2d 584 (C.A. 5); *Holtville Alfalfa Mills* v. *Wyatt*, 230 F. 2d 298 (C.A. 9).)

(b) Under this provision, the number of hours worked in the workweek which are in excess of 12 in any workday or workdays therein, or the number in excess of 56 in the week, whichever is the greater number, must be compensated as provided in section 7(b)(3). Thus, the requisite time-and-one-half compensation must be paid for all daily overtime hours in excess of 12 per day worked by an employee in a workweek when his hours worked do not exceed 56 in the week; and for all weekly overtime hours in excess of 56 which he works in a workweek when he does not work more than 12 hours in any day. When an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which the exemption is claimed, he must be paid at such overtime rate for all hours worked in the workweek in excess of the applicable daily maximum or in excess of the applicable weekly maximum, whichever number of hours is greater. Thus, if his total hours of work in the workweek which are in excess of the daily maximum are 10 and his hours in excess of the weekly maximum are 8, overtime compensation is required for 10 hours, not 18. As an example, suppose an employee employed at an hourly rate of $2.40 is employed under the other conditions specified for exemption under section 7(b)(3) and works the following schedule:

Hours	M	T	W	T	F	S	S	Tot.
Worked	14	9	10	15	12	8	0	68

Number of overtime hours in excess of 56 in the workweek, 12; number of hours in excess of 12 per day, five.

BEST DOCUMENT AVAILABLE

Since the weekly overtime hours are greater, the employee is entitled to overtime pay for 12 hours at $3.60 an hour (1½ x $2.40), a total of $43.60 for the overtime hours, in addition to pay at his regular rate for the remaining 56 hours (56 x $2.40) in the amount of $134.40, or a total of $177.60 for the week. If the employee had not worked the 8 hours on Saturday, his total hours worked in the week would have been 60, of which five were daily overtime hours, and there would have been 4 weekly overtime hours under the section 7(b) standard. For such a schedule the employee would be entitled to 5 hours of overtime pay at time and one-half (5 x 1½ x $2.40=$18) plus the pay at his regular rate for the remaining 55 hours (55 x $2.40=$132) making a total of $150 due him for the week.

(c) The overtime compensation payable to an employee under section 7(b)(3) when his hours worked in the workweek are in excess of 12 in any workday or in excess of 56 in the week must be "at a rate not less than one and one-half times the regular rate at which he is employed." This extra compensation for the excess hours cannot be said to have been paid to an employee unless all the straight time compensation due him for the nonovertime hours under his contract (express or implied) or under any applicable statute has been paid (§ 778.315 of this chapter). In computing the extra compensation due, the "regular rate" of the employee is calculated in accordance with section 7(e) of the Act, as explained in § 778.107 of this chapter, et seq., and can in no event be less than the minimum required by the Act (see § 778.107 of this chapter). Since, for exemption from section 7(a) under section 7(b)(3) in workweeks exceeding 40 hours, the Act requires that the employee receive not only compensation for 40 hours at not less than the minimum rate prescribed in section 6 but also "compensation for employment in excess of 40 hours" at a rate not less than one and one-half times such minimum rate, the "regular rate", on which time-and-one-half overtime pay must be computed for daily hours worked in excess of 12 or weekly hours worked in excess of 56, must be calculated in conformity with these minimum standards.

(d) The following illustrations of the application of these principles in the case of an employee whose applicable minimum wage rate under section 6 is $1.60 an hour may be helpful. First, suppose the "regular rate" at which such an employee is employed, calculated in accordance with section 7(e) of the Act and Part 778 of this chapter, is $2.40 an hour or more. This would be true of an employee employed solely at a single hourly rate of pay of $2.40 or more which he receives as straight time compensation for every hour of work. It would likewise be true of an employee, however compensated (whether by a salary for a fixed or variable number of hours, by commissions, piece rates, day rates or other pay systems or by a combination of these), whose pay for all hours worked in the workweek (except amounts excluded under section 7(e)) yields him average hourly straight-time earnings of $2.40 or more an hour. Since the employee's regular rate received for all nonovertime hours of work is in such a case not less than one and one-half times his applicable minimum rate under section 6, the compensation requirements of section 7(b)(3) are satisfied for all nonovertime as well as overtime hours worked if he receives compensation at his "regular rate" of $2.40 or more an hour for all hours worked in his workweek which are not in excess of 12 in his workday or 56 in his workweek, together with extra compensation for overtime in an amount sufficient to provide compensation for all his hours worked in excess of such daily or weekly hours, whichever are greater, at a rate at least 50 percent higher than such regular rate (at least $3.60 an hour if the regular rate is $2.40 an hour). A somewhat different situation is presented, however, where the employee whose applicable minimum wage under section 6 is $1.60 an hour is paid, as the act permits, at a wage rate for nonovertime hours up to 40 in the workweek which is not less than the $1.60 minimum but is not as much as the $2.40 required for hours of employment in excess of 40. As an example, suppose he is paid $2 an hour for

40 hours and $2.40 as required by section 7(b)(3) for hours in excess of 40, and works 60 hours in a workweek in which 10 of his hours worked are in excess of 12 in a workday for which overtime compensation must be paid at not less than one and one-half times his regular rate of pay. Since payment of the $2 and $2.40 rates for hours worked up to and in excess of 40, respectively, satisfies the straight-time requirements for compensation under section 7(b)(3), all the compensation requirements for exemption thereunder will be satisfied if, in addition, he is paid for the 10 daily overtime hours an extra sum equal to one-half his "regular rate" multiplied by 10. His regular rate is computed for the workweek by dividing his total straight-time compensation for the week by the number of hours worked for which it is paid and is accordingly $2.133 an hour ($2 x 40 = $80; $2.40 x 20 = $48; $80 + 48 = $128; $128 ÷ 60 = $2.133; see § 778.115 of this chapter). Thus, the section 7(b)(3) compensation requirements are satisfied by payment of straight-time compensation in the amount of $80 for 40 hours of work and in the amount of $48 for the 20 additional hours worked, together with $10.67 as overtime premium for the 10 daily overtime hours ($2.133 x ½ x 10), or total pay of $138.67 for the week.

§ 794.143 Work exempt under another section of the Act.

Where an employee performs work during his workweek, some of which is exempt under one section of the Act, and the remainder of which is exempt under another section or sections, of the Act, the exemptions may be combined. The employee's combination exemption is controlled in such case by that exemption which is narrower in scope. For example, if part of his work is exempt from both minimum wage and overtime compensation under one section of the Act, and the rest is exempt only from the overtime pay requirements by virtue of section 7(b)(3), the employee is exempt that week from the overtime pay provisions, but not from the minimum wage requirements. Similarly, an employee who spends part of his workweek in work which would, if done throughout the week, exempt him completely from the overtime pay requirements, and the remainder of the week in work exempt from such requirements only to the extent and under the conditions specified in section 7(b)(3), could be exempt from overtime pay only to such extent and under such conditions. Thus where an employee spends part of his workweek in transporting petroleum products by tank truck for an employer in an enterprise described in section 7(b)(3), and the remainder of his workweek in driving a taxicab for the employer's taxi business (work exempt from the overtime provisions under section 13(b)(17)), he is eligible for exemption from overtime pay only if he is compensated in such workweek in accordance with the provisions of section 7(b)(3) and only to the extent which that section provides.

RECORDS TO BE KEPT BY EMPLOYERS

§ 794.144 Records to be maintained.

(a) *Form of records.* No particular order or form of records is prescribed by the recordkeeping regulations (Part 516 of this chapter). Every employer operating under section 7(b)(3) of the Act is, however, required to maintain and preserve records containing the information and data as set out in §§ 516.2 and 516.21 of this chapter.

PART 800—EQUAL PAY FOR EQUAL WORK UNDER THE FAIR LABOR STANDARDS ACT

Subpart A—General

INTRODUCTORY

Sec.
800.0 General scope of the Fair Labor Standards Act.
800.1 Purpose of this part.
800.2 Significance of official interpretations.
800.3 Reliance on interpretations.
800.4 Matters discussed in this part.

BASIC COVERAGE AND EXEMPTION PROVISIONS AFFECTING APPLICATION OF EQUAL PAY REQUIREMENTS

800.5 Basic coverage as related to the equal pay provisions.
800.6 General coverage of employees "engaged in commerce".

BEST DOCUMENT AVAILABLE

Sec.
800.7 General coverage of employees "engaged in *** the production of goods for commerce".
800.8 "Closely related" and "directly essential" activities.
800.9 What goods are considered as produced for commerce.
800.10 Coverage is not based on amount of covered activity.
800.11 "Enterprise" coverage.
800.12 Exemptions from section 6 provided by section 13.

Subpart B—The Equal Pay Provisions

THE STATUTORY PROVISIONS

800.100 Section 6(d) of the Act.
800.101 Effective date of equal pay requirements.

APPLICATION OF PROVISIONS IN GENERAL

800.102 Application to employers.
800.103 Application to establishments.
800.104 Application to employees.
800.105 Employees not subject to provisions.
800.106 Application to labor organizations.

DEFINITIONS PERTINENT TO APPLICATION

800.107 "Employer", "employee", "employ" defined.
800.108 Meaning of "establishment".
800.109 "Labor organization" defined.
800.110 Meaning of "wages".
800.111 Wage "rate".
800.112 Cost or value of non-cash items as included in wages.
800.113 Particular types of payments as wages.

EQUALITY OF PAY

800.114 "Male jobs" and "female jobs" generally.
800.115 Inequalities in pay that raise questions under the Act.
800.116 Equality and inequality of pay in particular situations.

THE EQUAL PAY FOR EQUAL WORK STANDARD—GENERALLY

800.119 The job concept in general.
800.120 Effect of differences between jobs in general.
800.121 Job content controlling.
800.122 General guides for testing equality of jobs.
800.123 Determining equality of job content in general.
800.124 Comparing "exempt" and "nonexempt" jobs.

EQUAL SKILL

800.125 Jobs requiring equal skill in performance.
Sec.
800.126 Comparing skill requirements of jobs.

EQUAL EFFORT

800.127 Jobs requiring equal effort in performance.
800.128 Comparing effort requirements of jobs.

EQUAL RESPONSIBILITY

800.129 Jobs requiring equal responsibility in performance.
800.130 Comparing responsibility requirements of jobs.

SIMILAR WORKING CONDITIONS

800.131 Jobs performed under similar working conditions.
800.132 Determining similarity of working conditions.

EXCEPTIONS TO EQUAL PAY STANDARD

800.140 The specified exceptions.
800.141 Establishing application of an exception.
800.142 Sex must not be a factor in excepted wage differentials.
800.143 Establishing absence of sex as a factor.
800.144 Excepted "systems".
800.145 Application of exceptions illustrated—in general.
800.146 Examples—"red circle" rates, in general.
800.147 Examples—temporary reassignments.
800.148 Examples—training programs.
800.149 Examples—"head of household".
800.150 Examples—temporary and part-time employees.
800.151 Examples—employment cost factors.

RELATION TO OTHER LAWS.

800.160 Relation to other pay laws.
800.161 Higher State minimum wage.
800.162 Overtime payments required by State law.
800.163 Other laws not applying equally to employment of both sexes.

ENFORCEMENT

800.164 Investigations and compliance assistance.
800.165 Recordkeeping requirements.
800.166 Recovery of wages due; injunctions; penalties for willful violations.

AUTHORITY: Secs. 1-19, 52 Stat. 1060 as amended; 77 Stat. 56; 29 U.S.C. 201-219.

SOURCE: 30 FR 11504, Sept. 9, 1965, unless otherwise noted.

BEST DOCUMENT AVAILABLE

Subpart A—General

INTRODUCTORY

§ 800.0 General scope of the Fair Labor Standards Act.

The Fair Labor Standards Act, as amended, hereinafter referred to as the Act, is a Federal statute of general application which establishes minimum wage, overtime pay, child labor, and equal pay requirements that apply as provided in the Act. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard unless relieved therefrom by some exemption in the Act. Such employers are also required to comply with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

§ 800.1 Purpose of this part.

It is the purpose of this Part 800 to make available official interpretations of the Department of Labor with respect to the meaning and application of the equal pay provisions added to the Fair Labor Standards Act by the Equal Pay Act of 1963 (Pub. L. 88-38). The Equal Pay Act was enacted on June 10, 1963, for the purpose of correcting "the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex". This law amends the Fair Labor Standards Act by adding a new section 6(d) to its minimum wage provisions.

§ 800.2 Significance of official interpretations.

The interpretations of the law contained in this part are official interpretations of the Department of Labor with respect to the application under described circumstances of the provisions of law which they discuss. The ultimate decisions on interpretations of the Act are made by the courts. Court decisions supporting interpretations contained in this part are cited where it is believed they may be helpful. On matters which have not been determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore* v. *Swift*, 323 U.S. 134). In order that these positions may be made known to persons who may be affected by them, official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, May 24, 1950, 15 FR 3290). As included in the regulations in this part, these interpretations are believed to express the intent of the law as reflected in its provisions and as construed by the courts and evidenced by its legislative history. They indicate the construction of the law which the Secretary of Labor and the Administrator believe to be correct and which will guide them in the performance of their duties under the Act unless and until they are otherwise directed by authoritative decisions of the courts or conclude, upon reexamination of an interpretation, that it is incorrect. References to pertinent legislative history are made in this part where it appears that they will contribute to a better understanding of the interpretations.

§ 800.3 Reliance on interpretations.

On and after publication of this part in the FEDERAL REGISTER, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. So long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect, they may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251 et seq., discussed in Part 790 of this chapter). In addition, the Supreme Court has recognized that such interpretations of this Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance". Further, as stated by the Court: "Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." (*Skidmore* v. *Swift*, 323 U.S. 134). This part supersedes and replaces the interpretations previously published in the FEDERAL REGISTER and Code of Federal Regulations as Part 800 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Fair Labor Standards Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part are rescinded and withdrawn.

§ 800.4 Matters discussed in this part.

(a) This part primarily discusses the meaning and application of the equal pay provisions in section 6(d) of the Act. These provisions are discussed in some detail in Subpart B. The enforcement provisions applicable to the equal pay requirements are discussed in Subpart B, §§ 800.164-800.166. In addition, §§ 800.5 et seq. of this subpart briefly consider or make reference to the guides for determining what interstate commerce activities will bring employees and employers within the basic coverage of the Act so that its equal pay requirements may apply. The meaning and application of other provisions of the Act are discussed only to make clear their relevance to the equal pay provisions and are not considered in detail in this part.

(b) The interpretations in this part provide statements of general principles applicable to the subjects discussed and illustrations of the application of these principles to situations that frequently arise. They do not and cannot refer specifically to every problem which may be met in the consideration of the provisions discussed. The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

(c) Interpretations published elsewhere in this title deal with such subjects as the general coverage of the Act (Part 776 of this chapter), methods of payment of wages (Part 531, Subpart C of this chapter), computation and payment of overtime compensation (Part 778 of this chapter), retailing of goods or services (Part 779 of this chapter), hours worked (Part 785 of this chapter), and child labor provisions (Part 570 of this chapter). Regulations on recordkeeping are contained in Part 516 of this chapter, and regulations defining exempt bona fide executive, administrative, professional employees and outside salesmen are contained in Part 541 of this chapter. Regulations and interpretations on other subjects concerned with the application of the Act are listed in the table of contents to this chapter. Copies of any of these documents may be obtained from any office of the Wage and Hour Division.

BASIC COVERAGE AND EXEMPTION PROVISIONS AFFECTING APPLICATION OF EQUAL PAY REQUIREMENTS

§ 800.5 Basic coverage as related to the equal pay provisions.

The equal pay provisions neither extend nor curtail coverage of the Fair Labor Standards Act but simply place within the new requirements those employers and employees who were already subject to the Act's minimum wage requirements (H. Rept. No. 309, 88th Cong., 1st sess., p. 2). The nature of the employment coming within the basic or general coverage of the Act should therefore be clearly understood. The general coverage of the Act extends, and its requirements apply except as otherwise provided by a specific exemption, to every employee who is "engaged in commerce or in the production of goods for commerce" and every employee who is "employed in an enterprise engaged in commerce or in the production of goods for commerce" or "by an establishment" qualifying as such an enterprise, as specified and defined in the statute. What employees are so engaged or employed must be ascertained in the light of the definitions and delimitations set forth in the statute, giving due regard to authoritative interpretations by the courts and to the legislative history of the Act, as amended. In §§ 800.6 to 800.12, the employment which comes within this basic coverage is briefly outlined. For a more comprehensive discussion and a detailed explanation of the applicable principles, reference should be made to the interpretations on general coverage contained in Part 776 of this chapter.

§ 800.6 General coverage of employees "engaged in commerce".

(a) The minimum wage provisions of the Act have applied since 1938, and continue to apply along with the new equal pay provisions, except as otherwise provided by specific exemptions in the Act, to employees "engaged in commerce," "Commerce" is broadly defined in section 3(b) of the Act. It includes both interstate and foreign commerce and is not limited to transportation across State lines, or to activity of a commercial character. All parts of the movement among the several States or between any State and any place outside thereof of persons or things, tangibles or intangibles, including communication of information and intelligence constitute movement in "commerce" within the statutory definition. This includes those parts of any such activity which take place wholly within a single State. In addition, the instrumentalities for carrying on such commerce are so inseparable from the commerce itself that employees working on such instrumentalities within the borders of a single State are, by virtue of the contribution made by their work to the movement of the commerce, "engaged in commerce" within the meaning of the Act.

(b) Consistent with the purpose of the Act to apply the Federal standards "throughout the farthest reaches of the channels of interstate commerce," the courts have made it clear that the employees "engaged in commerce" to whom coverage is extended include every employee employed in the channels of such commerce or in activities so closely related to such commerce as to be considered a part of it as a practical matter. See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125; *Mitchell* v. *Volmer*, 349 U.S. 427; *Mitchell* v. *Lubin*, 358 U.S. 207; see also *Borden Co.* v. *Borella*, 325 U.S. 679; and see the discussion, with other pertinent court decisions cited in Part 776 of this chapter. Engaging "in commerce" includes activities connected therewith such as management and control of the various physical processes, together with the accompanying accounting and clerical activities. Thus, employees engaged in interstate or foreign commerce will typically include among others, employees in distributing industries such as wholesaling or retailing who sell, transport, handle, or otherwise work on goods moving in interstate or foreign commerce as well as workers who order, receive, guard, pack, ship, or keep records of such goods; employees who handle payroll or personnel functions for workers engaged in such activities; clerical and other workers who regularly use the mails, telephone, or telegraph for communication across State lines; and employees who regularly travel across State lines while working. For other illustrations see Part 776 of this chapter.

§ 800.7 General coverage of employees "engaged in * * * the production of goods for commerce".

(a) The minimum wage provisions of the Act also have applied since 1938, and continue to apply along with the new equal pay provisions, except as otherwise provided by specific exemptions in the Act, to employees "engaged in * * * the production of goods for commerce". The broad meaning of "commerce" as defined in section 3(b) of the Act has been outlined in § 800.6. "Goods" is also comprehensively defined in section 3(i) of the Act, and includes "articles or subjects of commerce of any character, or any part or ingredient thereof" not expressly excepted by the statute. The activities constituting "production" of the goods for commerce are defined in section 3(j) of the Act. These are not limited to such work as manufacturing but include handling or otherwise working on goods intended for shipment out of the State either directly or indirectly or for use within the State to serve the needs of the instrumentalities or facilities by which interstate or foreign commerce is carried on. See *United States* v. *Darby*, 312 U.S. 100; *Alstate Constr. Co.* v. *Durkin*, 345 U.S. 13. Employees engaged in any closely related process or occupation directly essential to such production of any goods, whether employed by the producer or by an independent employer, are also engaged, by definition, in "production". See § 800.8 and the detailed discussion in Part 776 of this chapter. Further, the courts have recognized that an enterprise producing goods for commerce does not accomplish the actual production of such goods solely with employees performing physical labor on them. Thus, in *Borden* v. *Borella*, 325 U.S. 679, it was held that employees engaged in the administration, planning, management, and control of the various physical processes together with the accompanying clerical and accounting activities are, from a productive standpoint and for purposes of the Act, "actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products" in the manufacturing plants or other producing facilities of the enterprise.

(b) Typically, but not exclusively, employees engaged in the production of goods for interstate or foreign commerce include those who work in manufacturing, processing, and distributing establishments, including wholesale and retail establishments, that "produce" (including handle or work on) goods for such commerce. This includes everyone employed in such establishments, or elsewhere in the enterprises by which they are operated whose activities constitute "production" of such goods under the principles outlined in paragraph (a) of this section. Thus, employees who sell, process, load, pack, or otherwise handle or work on goods which are to be shipped or delivered outside the State either by their employer or by another firm, and either in the same form or as a part or ingredient of other goods, are engaged in the production of goods for commerce within the coverage of the Act. So also are the office, management, sales, and shipping personnel, and maintenance, custodial, and protective employees who perform, as a part of the integrated effort for the production of the goods for commerce, services related to such production or to such goods or to the plant, equipment, or personnel by which the production is accomplished.

§ 800.8 "Closely related" and "directly essential" activities.

As previously noted in § 800.7 an employee is engaged in the production of goods for interstate or foreign commerce within the meaning of the general coverage provisions of the Act even if his work is not an actual and direct part of such production, so long as he is engaged in a process or occupation which is "closely related" and "directly essential" to it. This is true whether he is employed by the producer of the goods or by someone else who provides goods or services to the producer. See in this connection *Kirschbaum* v. *Walling*, 316 U.S. 517, and *Mitchell* v. *Joyce Agency*, 348 U.S. 945, affirming 110 F. Supp. 918. A full discussion of "closely related" and "directly essential" work is contained in Part 776 of this chapter. Typical of employees covered under these principles are bookkeepers, stenographers, clerks, accountants, and auditors and other office and white-collar workers, and employees doing payroll, timekeeping, and time study work for the producer of goods; employees in the personnel, labor relations, safety and health, advertising, promotion, and public relations activities of the producing enterprise; work instructors for the producers; employees maintaining, servicing, repairing or improving the buildings, machinery, equipment, vehicles or other facilities used in the production of goods for commerce, and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are illustrative, rather than exhaustive of the employees who are "engaged in the production of goods for commerce" by reason of performing activities closely related and directly essential to such production.

§ 800.9 What goods are considered as produced for commerce.

Goods (as defined in 3(i) of the Act) are "produced for commerce" if they are "produced, manufactured, mined, handled or in any other manner worked on" in any State for sale, trade, transportation, transmission, shipment, or delivery, to any place outside thereof. Goods are produced for commerce where the producer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in interstate or foreign commerce. If such movement of the goods in commerce can reasonably be anticipated by the producer when the goods are produced, it makes no difference whether he himself or the person to whom the goods are transferred puts the goods in interstate or foreign commerce. The fact that goods do move in interstate or foreign commerce is strong evidence that the producer intended, hoped, expected, or had reason to believe that they would so move. Goods may also be produced "for commerce" where they are to be used within the State and not transported in any form across State lines. This is true where the use to which they are put is one which serves the needs of the instrumentalities or facilities by which interstate or foreign commerce is carried on within the State. These principles are discussed comprehensively in Part 776 of this chapter.

§ 800.10 Coverage is not based on amount of covered activity.

The Act makes no distinction as to the percentage, volume, or amount of activities of either the employee or the employer which constitute engaging in commerce or in the production of goods for commerce. (*Mabee* v. *White Plains Publishing Co.*, 327 U.S. 128; *United States* v. *Darby*, 312 U.S. 100.) As explained more fully in Part 776 of this chapter, the law is settled that every employee whose activities in commerce or in the production of goods for commerce, even though small in amount, are regular and recurring, is considered "engaged in commerce or in the production of goods for commerce". Also, under the definition in section 3(s) of the Act, an enterprise described in any of the four numbered clauses of the subsection is an enterprise "engaged in commerce or in the production of goods for commerce" if, in its activities, some employees are so engaged, "including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person".

[32 FR 2378, Feb. 3, 1967]

§ 800.11 "Enterprise" coverage.

The scope of the added coverage on an enterprise basis, which was provided by amendments to the Act, is determined with reference to the special definitions of the term "enterprise" in section 3(r) of the Act and of the term "enterprise engaged in commerce or in the production of goods for commerce" under section 3(s). Under these enterprise coverage provisions, if an enterprise or establishment is an "enterprise engaged in commerce or in the production of goods for commerce" as defined and delimited in section 3(s) of the Act, every employee employed in such enterprise or by such establishment is within the coverage of the minimum wage and the equal pay provisions, except as otherwise specifically provided by the Act. "Enterprise" coverage is discussed comprehensively elsewhere in this chapter. A detailed discussion of the statutory definition of "enterprise" and of enterprise coverage as it relates to enterprises which have retail or service establishments and as it relates to gasoline service establishments is contained in Part 779 of this chapter.

§ 800.12 Exemptions from section 6 provided by section 13.

The equal pay provisions do not apply to employees exempted from the provisions of section 6 under any provision of section 13(a) of the Act. The following employees are among those excluded if their employment fully satisfies all the statutory conditions for exemption: Bona fide executive, administrative, and professional employees, including academic administrative personnel and teachers in elementary and secondary schools, and outside salesmen, as defined in regulations (see Part 541 of this chapter); employees of certain retail or service establishments (see Part 779 of this chapter); employees of certain amusement or recreational establishments (see Act, sec. 13(a)(3)); employees of certain small newspapers (see Act, sec. 13(a)(8)); employees of motion picture theaters (see Act, sec. 13(a)(9)); switchboard operators of independent telephone companies which have fewer than 750 stations (see Act, sec. 13(a)(10)); employees on small farms and certain hand harvest workers paid piece rates (see Part 780 of this chapter).

[32 FR 2379, Feb. 3, 1967]

Subpart B—The Equal Pay Provisions

THE STATUTORY PROVISIONS

§ 800.100 Section 6(d) of the Act.

The Equal Pay Act of 1963 amended section 6 of the Fair Labor Standards Act by adding thereto a new subsection (d) as follows:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> (2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.
>
> (3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.
>
> (4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

§ 800.101 Effective date of equal pay requirements.

(a) Section 4 of the Equal Pay Act of 1963 provides as follows with respect to the effective date of its amendments to the Fair Labor Standards Act:

> SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d)(4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expi-

ration of two years from the date of enactment of this Act, whichever shall first occur.

(b) Under the above provision, on and after June 11, 1965, the equal pay provisions are effective with respect to all employment subject to their terms. On and after June 11, 1964, these provisions were applicable to most such employment. However, their application was deferred as to employees covered by bona fide collective bargaining agreements, which were in effect on May 11, 1963, and which did not terminate until some date after June 11, 1964. As to employees covered by such agreements the provisions became effective on the termination date of the agreement or on June 11, 1965, whichever was the earlier date.

APPLICATION OF PROVISIONS IN GENERAL

§ 800.102 Application to employers.

The prohibition against discrimination in wages on account of sex contained in section 6(d)(1) of the Act (see § 800.100) is applicable to every employer having employees subject to a minimum wage under the Act. The employer may not discriminate on the basis of sex against such employees in any establishment (see § 800.103) in which such employees are employed by him by paying them wages at rates lower than he pays employees of the opposite sex employed in the same establishment for work subject to the equal pay standard—that is, where equal work is performed by such employees and by employees of the opposite sex on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. (See §§ 800.120-800.132.) The Act excepts from this general prohibition such differences between the wage rates for such work performed by men and women employed by the employer in the establishment as can be shown to be based on a factor or factors other than sex. (See §§ 800.140-800.150.) It is clear from the proviso included in section 6(d)(1) that where a wage rate differential in violation of the provision is paid, the violation cannot be corrected by reducing the wage rate of any employee.

§ 800.103 Application to establishments.

The prohibition against discrimination in wages on account of sex contained in section 6(d)(1) of the Act applies "within any establishment" in which employees who must be paid a minimum wage under section 6 are employed by an employer. The term "establishment" as used in section 6(d)(1) has the same meaning as it has in section 13(a)(2) and elsewhere in the Act. (See § 800.108.) It should be kept in mind, in determining an employer's obligations under the equal pay provisions, that "employer" and "establishment" as used in these and other provisions of the Act are not synonymous terms. An employer may have more than one establishment in which he employs employees within the meaning of the Act. In such cases, the legislative history makes clear that there shall be no comparison between wages paid to employees in different establishments.

§ 800.104 Application to employees.

As has been seen, there must be compliance by the employer with the equal pay requirements within any establishment in which employees subject to the Act's minimum wage provisions are employed by him. The Act's concern with wage discrimination by an employer on account of sex to the detriment of his employees who are subject to the minimum wage provisions is not limited either by its language or by its legislative history to those employees whose work is performed on the premises of their employer's establishment. The Act speaks of the employment of employees in the establishment rather than of their engagement in work there. Also, the legislative history of the Equal Pay Act makes it clear that coverage under the equal pay provisions is equal to that provided by the other provisions of section 6 of the Fair Labor Standards Act, and that those employers and employees who are subject to the minimum wage provisions will be subject to the new provisions on equal pay. (See S. Rept. No. 176, 88th Cong.

1st sess., p. 2; H. Rept. No. 309, 88th Cong., 1st sess., p. 2.) Congress clearly rejected the concept that the equal pay provisions apply only to work performed inside a physical establishment. Otherwise, those employees, subject to section 6 of the Act would be incongruously deprived of equal pay protection simply because their work is performed away from the physical premises of the establishment in which they are employed. On the other hand, it is clear from the language of the Act that in each distinct physical place of business where employees of an employer work (including, but not limited to, the employer's own establishments), the obligation of the employer to comply with the equal pay requirements must be determined separately with reference to those of his employees who are employed in that particular establishment. Accordingly, where there are a number of distinct physical places of business in which an employer's employees are employed, compliance with the equal pay provisions must be tested within each establishment by comparing the jobs in which employees are employed in that establishment and the wages paid for work on such jobs when performed by employees of opposite sexes.

[32 FR 2379, Feb. 3, 1967]

§ 800.105 Employees not subject to provisions.

An employee may be employed in an establishment by an employer subject to the equal pay provisions, and yet not be protected by these provisions. Unless such an employee is one to whom the minimum wage provisions apply, the Act does not afford protection from a discrimination in wages based on sex between such employee and an employee of the opposite sex. This is true both with respect to employees who are not covered under section 6 and with respect to employees to whom section 6 cannot apply by reason of an express exemption in section 13(a). (See § 800.12.) More particularly, the equal pay standards have no application with respect to wages paid employees who are neither engaged in or in the production of goods for interstate commerce nor employed in an enterprise which is so engaged.

§ 800.106 Application to labor organizations.

Section 6(d)(2) of the Act prohibits a labor organization, representing employees of an employer having employees subject to the minimum wage provisions of section 6, from engaging in acts that cause or attempt to cause the employer to discriminate against an employee in violation of the equal pay provisions. Agents of the labor organization are also prohibited from doing so. Thus, such a labor organization and its agents must refrain from strike or picketing activities aimed at inducing an employer to institute or maintain a prohibited wage differential, and must not demand any terms or any interpretation of terms in a collective bargaining agreement with such an employer which would require the latter to discriminate in the payment of wages contrary to the provisions of section 6(d)(1). Section 6(d)(2), together with the special provision in section 4 of the Equal Pay Act of 1963 allowing a deferred effective date for application of the equal pay provisions to employees covered by specified existing collective bargaining agreements (see § 800.101) are indicative of the legislative intent that in situations where wage rates are governed by collective bargaining agreements, unions representing the employees shall share with the employer the responsibility for ensuring that the wage rates required by such agreements will not cause the employer to make payments that are not in compliance with the equal pay provisions. Thus, where equal work is being performed within the meaning of the statute, a wage rate differential which exists between male and female employees cannot be justified on the ground that it is a result of negotiation by the union with the employer, for negotiation of such a discriminatory wage differential is prohibited under the terms of the equal pay amendment.

DEFINITIONS PERTINENT TO APPLICATION

§ 800.107 "Employer", "employee", "employ" defined.

The Act provides its own definitions of "employer", "employee", and "employ", under which "economic reality" rather than "technical concepts" determines whether there is employment subject to its terms (*Goldberg* v. *Whitaker House Cooperative*, 366 U.S. 28; *United States* v. *Silk*, 331 U.S. 704; *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722). An "employer", as defined in section 3(d) of the Act, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (a) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (b) in the operation of a railway or carrier referred to in such sentence) or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization". An "employee" is defined in section 3(e) of the Act "includes any individual employed by an employer" and "employ", as used in the Act, is defined in section 3(g) to include "to suffer or permit to work". It should be noted, as explained in the interpretative bulletin on joint employment, Part 791 of this chapter, that in appropriate circumstances two or more employers may be jointly responsible for compliance with the statutory requirements applicable to employment of a particular employee.

[32 FR 2379, Feb. 3, 1967]

§ 800.108 Meaning of "establishment".

Although not expressly defined in the Act, the term "establishment" has a well settled meaning in the application of the Act's provisions. It refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled and has been recognized in the Congress in the course of enactment of amendatory legislation (*Phillips* v. *Walling*, 324 U.S. 490; *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027; 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong. 1st sess., p. 25). Each physically separate place of business is ordinarily considered a separate establishment. For example, where a manufacturer operates at separate locations a plant for production of its goods, a warehouse for storage and distribution, several stores from which its products are sold, and a central office for the enterprise, each physically separate place of business is a separate establishment. Under certain circumstances, however, two or more portions of a business enterprise, even though located on the same premises and under the same roof, may constitute more than one establishment. This would ordinarily be the case only if these portions of the enterprise are both physically segregated and engaged in operations which are functionally separated from each other and which have separate employees and maintain separate records. The application of these principles is illustrated further and in more detail by the discussion in Part 779 of this chapter of the term "establishment".

[32 FR 2379, Feb. 3, 1967]

§ 800.109 "Labor organization" defined.

For purposes of application to labor organizations of the requirements of section 6(d) of the Act and the enforcement of such requirements under sections 16 and 17 (see § 800.166), section 6(d)(4) of the Act defines the term "labor organization" as meaning "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." This is the same definition of "labor organization" that is used in the Labor Management Relations Act, 1947, and will be applied in the same manner.

§ 800.110 Meaning of "wages".

The term "wages" used in section 6(d)(1) of the Act is considered to have the same meaning it has elsewhere in the Act. As a general rule, in determining compliance with the equal pay provisions, the wages paid by the employer will be calculated pursuant to the same principles and procedures as have traditionally been followed in calculating such wages for purposes of determining compliance with the minimum wage provisions of the Act. Wages paid to an employee generally include all payments made to or on behalf of the employee as remuneration for employment. The provisions of section 7(e) of the Act under which some such payments may be excluded in computing an employee's "regular rate" of pay for purposes of section 7 do not authorize the exclusion of any such remuneration from the "wages" of an employee in applying section 6(d) of the Act. Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest, or other days or hours in excess or outside of the employee's regular days or hours of work are remuneration for employment and therefore wage payments that must be considered in applying the equal pay provisions of the Act, even though not a part of the employee's "regular rate". On the other hand, payments made by an employer to an employee which do not constitute remuneration for employment are not "wages" to be compared for equal pay purposes under section 6(d) of the Act. Examples are payments related to maternity, and such reasonable payments for reimbursable expenses of traveling on the employer's business as are discussed in § 778.217 of this chapter.

[32 FR 2379, Feb. 3, 1967]

§ 800.111 Wage "rate".

The term wage "rate" used in section 6(d)(1) of the Act is considered to encompass all rates of wages whether calculated on a time, piece, job, incentive or other basis. The term includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. The term also includes the rate at which a "draw", advance, or guarantee is paid against a commission settlement.

§ 800.112 Cost or value of non-cash items as included in wages.

The reasonable cost or fair value of certain perquisites, as provided in section 3(m) of the Act and Part 531 of this chapter is, by definition, a part of the wage paid to an employee for purposes of the Act. Section 3(m), in part provides that the wage paid to any employee includes "the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees". As an exception to this rule, section 3(m) provides the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee. A further provision of section 3(m) authorizes the Secretary "to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value." The statute directs that such evaluations, "where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee". As explained in Part 531 of this chapter, it is the above provision of the Act which governs the payment, otherwise than in cash, of wages which the Act requires. Regulations under which the reasonable cost or fair value of such facilities furnished may be computed for inclusion as part of the wages required by the Act are also contained in Part 531 of this chapter.

[32 FR 2380, Feb. 3, 1967]

§ 800.113 Particular types of payments as wages.

In addition to the examples referred to in §§ 800.110 through 800.112, some further illustrations of the types of payments that must be considered in computing wages and wage rates for purposes of the equal pay provisions may be helpful. The Act requires comparison of the wage rates paid for "work on jobs", which makes relevant all remuneration for employment and not just that portion which constitutes compensation for particular hours of employment or particular work done. Clearly this includes all payments that may be counted as part of the minimum wage rate per hour required under section 6 of the Act, all payments that are part of the employee's regular rate under section 7 of the Act, and all overtime premiums. It includes in addition, however, other payments (such as the holiday and vacation pay previously mentioned in § 800.110) for the employee's work on the job as a whole which may have no direct relation to particular hours or weeks of work; and the inclusion of such payments in the wages compared for equal pay purposes does not depend on whether they can be counted as a part of the wage rate per hour required under section 6 as a minimum wage or whether they constitute part of the regular rate of pay under section 7. In accordance with the foregoing principles, the wages to be considered in determining compliance with the equal pay provisions include, in addition to such payments as hourly and daily wages, sums paid as weekly, monthly, or annual salaries; wages measured by pieces produced or tasks performed; commissions, bonuses or other payments measured by production, efficiency, attendance, or other job-related factors, or agreed to be paid under the employment contract; standby and on-call pay; and extra payments made for hazardous, disagreeable or inconvenient working conditions. These are illustrative, although not exhaustive, of the types of payments included, when part of the remuneration for employment in the wages to be compared where employees of opposite sexes are employed in jobs subject to the equal pay standard. On the other hand, the "wages" which are compared for equal pay purposes do not include bona fide gifts or payments in the nature of gifts which would be excluded from the employee's regular rate under section 7(e)(1) of the Act and § 778.212 of this chapter. Likewise, sums paid as discretionary bonuses are not considered wages for equal pay purposes if such payments meet the requirements of section 7(e)(3)(a) of the Act and § 778.211 of this chapter. Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include sums paid in recognition of services performed during a given period pursuant to a bona fide profit-sharing plan or trust meeting the requirements of Part 549 of this chapter or pursuant to a bona fide thrift or savings plan meeting the requirements of Part 547 of this chapter, and contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees. (See §§ 778.214 and 778.215 of this chapter.)

[32 FR 2380, Feb. 3, 1967]

EQUALITY OF PAY

§ 800.114 "Male jobs" and "female jobs" generally.

(a) Wage classification systems which designate certain jobs as "male jobs" and other jobs as "female jobs" frequently specify markedly lower rates for the "female jobs". Because such a practice frequently indicates a pay practice of discrimination based on sex, where such systems exist a serious question would be raised as to whether prohibited wage differentials are involved. This position is consistent with that taken by the National War Labor Board which found such systems inherently discriminatory and explained that it is not consistent with the principle of equal pay for equal work to designate certain jobs as "female jobs" and other jobs as "male jobs" and on that ground alone establish rate differentials against the former and in favor of the latter. The Board held that the equal pay principle requires that proper rates be set for all jobs, based upon a fair objective evaluation of duties and functions, irrespective of the sex of the workers assigned to them (General Electric Co. and Westinghouse Electric Corp., Case No. 111-17208-D and 111-17209-D, Dec. 12, 1945). It should be further noted that wage classification systems which designate certain jobs as "male jobs" and other jobs as "female jobs" may contravene Title VII of the Civil Rights Act of 1964 except in those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise (78 Stat. 241, 256).

(b) Section 6(d)(1) prohibits discrimination on the basis of sex in the payment of wages to employees "for equal work *on jobs*" which are equal under the standards which it provides (emphasis supplied). (See the discussion in § 800.119 et seq.) The legislative history of the Equal Pay Act expressly refers to the War Labor Board experience as furnishing a guide for testing "the relationship between jobs" and determining "equal work" and "equal skills" for purposes of a "practical" administration and application of the Act's "equal pay policy" (see, e.g. S. Rept. 176, 88th Cong. 1st sess., to accompany S. 1409; H. Rept. 309, 88th Cong. 1st sess., to accompany H.R. 6060). Some of the earliest cases confronting the War Labor Board on the application of the "equal pay for equal work" principle involved situations in which women were being hired to replace men as a result of the manpower shortages. The Board consistently ruled that the principle applied to these situations, as well as to situations where male and female employees performed the same work concurrently and interchangeably, and therefore that women assigned "to take the place of men" to perform substantially the same jobs "formerly performed by men" were entitled to the same rate of pay as the men whom they replaced. Rotary Cut Box Shook Industry, 12 W.L.B. Rept. 605, 606, 608; General Electric Co., and Westinghouse Electric Co., Supra, at pp. 668-669, 677, 686.

(c) That the Equal Pay Act was intended to encompass situations of this kind is confirmed by the declared purposes and terms of the Act as well as by the legislative history. The statute is intended to eliminate sex as a basis for wage differentials between employees performing equal work on jobs within the establishment, and if the rates paid for the same jobs are lower when occupants of the jobs are of one sex than they are when the jobs are filled by employees of the opposite sex, such discrimination within the establishment is equally in violation of the statutory prohibition whether or not employees of both sexes are employed in such jobs at the same time. Accordingly, where an employee of one sex is hired or assigned to a particular job to replace an employee of the opposite sex, comparison of the newly assigned employee's wage rate with that of the replaced former employee is required for purposes of section 6(d)(1), whether or not the job is performed concurrently by employees of both sexes. For example, if a particular job which in the past has been performed by a male employee becomes vacant and is then filled by a female employee, it would be contrary to the equal pay requirement to pay the female employee a lower wage rate than was paid for the same job when performed by the male employee, even though employees of both sexes may not be performing the job at the same time. Payment of the lower wage rate in such circumstances is a prohibited wage differential. The same principle is involved if all employees of one sex are removed from a particular job (by transfer or discharge) so as to retain employees of only one sex in a job previously performed interchangeably or concurrently by employees of both sexes. If a prohibited sex-based wage differential had been established or maintained in violation of the Act when the same job was being performed by employees of both sexes, the employer's obligation to pay the higher rate for the job cannot be avoided or evaded by the device of confining the job to members of the lower paid sex. Compliance with the Act in such circumstances can be achieved only by increasing the wage rate to the higher rate paid for the job when performed by employees of the opposite sex.

[32 FR 2380, Feb. 3, 1967, as amended at 32 FR 5737, Apr. 8, 1967]

§ 800.115 Inequalities in pay that raise questions under the Act.

It is necessary to scrutinize with especial care those inequalities in pay between employees of opposite sexes which may indicate a pattern of discrimination in wage payment that is based on sex. Thus, a serious question would be raised where such an inequality, allegedly based on a difference in job content, is in fact one in which the employees occupying the job purportedly requiring the higher degree of skill, effort, or responsibility receives the lower wage rate. Likewise, because the equal pay amendment was designed to eliminate wage rate differentials which are based on sex, situations will be carefully scrutinized where employees of only one sex are concentrated in the lower grades of the wage scale, and where there does not appear to be any material relationship other than sex between the lower wage rates paid to such employees and the higher rates paid to employees of the opposite sex. Such concentrations in rate range situations may occur also where an employer follows a practice of paying a range of rates to newly hired employees. Differentials in entrance rates will not constitute a violation of the equal pay principle if the factors taken into consideration in determining which rate is to be paid each employee are applied equally to men and women. This would be true, for example, if all persons who have a parent employed by the firm are paid at the highest rate of the rate range whether they are men or women. However, if in a particular establishment all persons of one sex tend to be paid at the lowest rate of the range and employees of the opposite sex hired to perform the same work tend to be paid at the highest rate of the range, and if no specific factor or factors other than sex appear to be associated with the difference in pay, a serious question would be raised as to whether the pay practice involves prohibited wage differentials.

§ 800.116 Equality and inequality of pay in particular situations.

(a) *Overtime work.* Because overtime premiums are a part of wages for purpose of the equal pay provisions, where men and women receive the same straight-time rates for work subject to the equal pay standards, but the men receive an overtime premium rate of twice the straight-time rate while the women receive only one and one-half times the straight-time rate for overtime a Prohibited wage rate differential is being paid. On the other hand, where male and female employees perform equal work during regular hours but employees of one sex only continue working overtime into another work period, work performed during this later period may be compensated at a higher rate where such is required by law or is the customary practice of the employer. However, in such a situation the payment of the higher rate to employees of one sex for all hours worked, including the non-overtime hours when they are performing equal work with employees of the opposite sex, would result in a violation of the equal pay provisions. If male and female employees are performing equal work in the establishment during regular hours but only some of these employees continue working into an overtime period, payment of a higher wage rate for the overtime worked would not be in violation of the equal pay standard so long as it were paid for the actual overtime hours worked by the employees, whether male or female.

(b) *Special assignments.* The fact that an employee may be required to perform an additional task outside his regular working hours would not justify payment of a higher wage rate to that employee for all hours worked. However, employees who are assigned a different and unrelated task to be performed outside the regular workday may under some circumstances be paid at a different rate of pay for the time spent in performing such additional duty provided such rate is commensurate with the task performed. For example, suppose a male employee is regularly employed in the same job with female employees in the same establishment in work which requires equal skill, effort and responsibility and is performed under similar working conditions, except that the male employee must carry money to a bank after the establishment closes at night. Such an employee may be paid at a different rate for the time spent in performing this unrelated task if the rate is appropriate to the task performed and the payment is bona fide and not simply used as a device to escape the equal pay requirements of the Act.

(c) *Vacation or holiday pay.* Since vacation or holiday pay is deemed to be remuneration for employment included in wages within the meaning of the Act, if employees of one sex receive vacation pay for a greater number of hours than employees of the opposite sex, a prohibited wage rate differential is being paid if their work is subject to the equal pay standard and the differential is not shown to come within any of the specified exceptions.

(d) *Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

(e) *Commissions.* The establishment of different rates of commission on different types of merchandise would not result in a violation of the equal pay provisions where the factor of sex provides no part of the basis for the differential. For example, suppose that a retail store maintains two shoe departments, each having employees of both sexes, that the shoes carried in the two departments differ in style, quality, and price, and that the male and female sales clerks in the one department are performing "equal work" with those in the other. In such a situation, a prohibited differential would not result from payment of a lower commission rate in the department where a lower price line with a lower markup is sold than in the other department where the merchandise is higher priced and has a higher markup, if the employer can show that the commission rates paid in each department are applied equally to the employees of both sexes in the establishment for all employment in that department and that the factor of sex has played no part in the setting of the different commission rates.

[30 FR 11504, Sept. 9, 1965, as amended at 31 FR 6770, May 6, 1966]

THE EQUAL PAY FOR EQUAL WORK STANDARD—GENERALLY

§ 800.119 The job concept in general.

Section 6(d)(1) of the Act prohibits an employer from paying to employees of one sex wages at rates lower than he pays employees of the opposite sex for "equal work on jobs" described by the statute in terms of equality of the "skill, effort, and responsibility" required for performance and similarity of the "working conditions" under which they are performed. This descriptive language refers to "jobs". In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time. As the legislative history makes clear, the equal pay standard provided by the Act is designed to eliminate any wage rate differentials which are based on sex; nothing in the equal pay provisions is intended to prohibit differences in wage rates that are based not at all on sex but wholly on other factors. (See S. Rept. No. 176, 88th Cong. 1st sess., p. 4; H. Rept. No. 309, 88th Cong, 1st sess., p. 2.)

§ 800.120 Effect of differences between jobs in general.

There is evidence that Congress intended that jobs of the same or closely related character should be compared in applying the equal pay for equal work standard (Daily Congressional Record, House, May 23, 1963, pp. 8686, 8698). Jobs that require equal skill, effort, and responsibility in their performance within the meaning of the Act are usually not identical in every respect (Daily Congressional Record, Senate, May 28, 1963, p. 9219). Congress did not intend that inconsequential differences in job content would be a valid excuse for payment of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment. It will be remembered in this connection that the National War Labor Board (to the experience of which attention is directed in the Senate and House Committee Reports) developed a policy of ignoring inconsequential differences in job content in administering equal pay for equal work provisions (Brown & Sharp Manufacturing Co. Case No. 2228-D, September 25, 1942). On the other hand, it is clear that Congress did not intend to apply the equal pay standard to jobs substantially differing in their terms and conditions. Thus, the question of whether a female bookkeeper should be paid as much as a male file clerk required to perform a substantially different job is outside the purview of the equal pay provisions. It is also clear that the equal pay standard is not to be applied where only men are employed in the establishment in one job and only women are employed in a dissimilar job. For example, the standard would not apply where only women are employed in clerk typist positions and only men are employed in jobs as administrative secretaries if the latter really require substantially different duties.

§ 800.121 Job content controlling.

Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance. For example, the fact that jobs performed by male and female employees may have the same total point value under an evaluation system in use by the employer does not in itself mean that the jobs concerned are equal according to the terms of the statute. Conversely, although the point values allocated to jobs may add up to unequal totals, it does not necessarily follow that the work being performed in such jobs is unequal when the statutory tests of the equal pay standard are applied. Job titles are frequently of such a general nature as to provide very little guidance in determining the application of the equal pay standard. For example, the job title "clerk" may be applied to employees who perform a variety of duties so dissimilar as to place many of them beyond the scope of comparison under the statute. Similarly, jobs included under the title "stock clerk" may include an employee of one sex who spends all or most of his working hours in shifting and moving goods in the establishment whereas another employee, of the opposite sex, may also be described as a "stock clerk" but be engaged entirely in checking inventory. Clearly, the equal pay standard would not apply where jobs require such substantially different duties, even though the job titles are identical. In other situations, including those which exist in the case of jobs identified by the general title "retail clerks", the facts may show that equal skill, effort, and responsibility are required in the jobs of male and female employees notwithstanding they are engaged in selling different kinds of merchandise. In all such situations, the application of the equal pay standard will have to be determined by applying the terms of the statute to the full factual situation.

§ 800.122 General guides for testing equality of jobs.

(a) What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration. The terms are considered to constitute three separate tests, each of which must be met in order for the equal pay standards to apply. In applying the tests it should be kept in mind that "equal" does not mean "identical" (Daily Congressional Record, Senate, May 28, 1963, p. 9219). Insubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable. On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality as between the jobs justifying differences in pay. In determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs. Such an inquiry may, for example, disclose that apparent differences between jobs have not been recognized as relevant for wage purposes and that the facts as a whole support the conclusion that the differences are too insubstantial to prevent the jobs from being equal in all significant respects under the law.

(b) To illustrate, where employees of opposite sexes are employed in jobs in which the duties they are required to perform and the working conditions are substantially the same, except that an employee of one sex is required to perform some duty or duties involving a higher skill which an employee of the other sex is not required to perform, the fact that the duties are different in this respect is insufficient to remove the jobs from the application of the equal pay standard if it also appears that the employer is paying a lower wage rate to the employee performing the additional duties notwithstanding the additional skill which they involve. In other situations, where employees of opposite sex are employed in jobs which are equal in the levels of skill, effort, and responsibility required for their performance, it may be alleged that the assignment to employees of one sex but not the other of certain duties requiring less skill makes the jobs too different for comparison under the equal pay provisions. But so long as the higher level of skill is required for the performance of the jobs occupied by employees of both sexes, the fact that some of the duties assigned to employees of one sex require less skill than the employee must have for the job as a whole does not warrant any conclusion that the jobs are outside the purview of the equal pay standard. Such a conclusion would be especially inappropriate if the employees of the sex to whom the less skilled work was assigned received a higher rate of pay. There are, of course, situations in which a review of all the pertinent facts will clearly establish that the male and female employees in question are not performing equal work on jobs which are equal in their requirements of skill, effort, and responsibility and which are performed under similar working conditions. Where it is clear that this is so, the existence or extent of a wage differential between employees of opposite sexes cannot of itself provide a basis for holding an employer liable for violations under the provisions of section 6(d) of the Act.

§ 800.123 Determining equality of job content in general.

In determining whether differences in job content are substantial in order to establish whether or not employees are performing equal work within the meaning of the Act, the amounts of time which employees spend in the performance of different duties are not the sole criteria. It is also necessary to consider the degree of difference in terms of skill, effort, and responsibility. These factors are related in such a manner that a general standard to determine equality of jobs cannot be set up solely on the basis of a percentage of time. Consequently, a finding that one job requires employees to expend greater effort for a certain percentage of their working time than employees performing another job, would not in itself establish that the two jobs do not constitute equal work. Similarly, the performance of jobs on different machines or equipment would not necessarily result in a determination that the work so performed is unequal within the meaning of the statute if the equal pay provisions otherwise apply. If the difference in skill or effort required for the operation of such equipment is inconsequential, payment of a higher wage rate to employees of one sex because of a difference in machines or equipment would constitute a prohibited wage rate differential. Likewise, the fact that jobs are performed in different departments or locations within the establishment would not necessarily be sufficient to demonstrate that unequal work is involved where the equal pay standard otherwise applies. This is particularly true in the case of retail establishments, and unless a showing can be made by the employer that the sale of one article requires such a higher degree of skill or effort than the sale of another article as to render the equal pay standard inapplicable, it will be assumed that the salesmen and saleswomen concerned are performing equal work. Although the equal pay provisions apply on an establishment basis and the jobs to be compared are those in the particular establishment, all relevant evidence that may demonstrate whether the skill, effort, and responsibility required in the jobs at the particular establishment are equal should be considered, whether this relates to the performance of like jobs in other establishments or not.

§ 800.124 Comparing "exempt" and "nonexempt" jobs.

Situations sometimes arise in which it is alleged that lower wages are being paid, in violation of the Act, to a nonexempt employee than to an exempt employee of the opposite sex for equal work on jobs said to be equal within the meaning of the Act. Usually it is necessary in such a case to scrutinize carefully the respective job requirements, working conditions, and pay arrangements before it is possible to reach an informed judgment as to the existence of any violation of the Act. To illustrate, suppose it is alleged that employees of opposite sexes are performing equal work within the meaning of the Act and that a wage discrimination on account of sex exists because one of such employees, but not the other, is paid the minimum compensation on a salary basis which is required for exemption as a bona fide executive or administrative employee and is treated by the employer as such an exempt employee under section 13(a)(1) of the Act and the regulations in Part 541 of this chapter. In such a case, regard must be had to the fact that the regulations define an employee employed in a bona fide executive or administrative capacity in terms of the coexistence of a number of factors only one of which is the receipt of compensation in a specified minimum amount on a salary basis. The existence of all these factors must be verified to determine whether the employer is correct in treating the employee who receives such salary as exempt. Regard must also be had to the fact that an employee who qualifies for exemption, because all the factors required by the regulations coexist, may be required to work as many hours as the employer may be able to persuade him to work for the stated salary, without any necessity of compliance by the employer with the minimum wage, equal pay or overtime compensation requirements of the Act. This is important because the fact that another employee of the opposite sex doing similar work does not receive the salary requisite for an exemption under the regulations would not in all cases mean that such employee is being paid at a lower rate of pay. In fact, because the nonexempt employee must receive at least the minimum wage for every hour worked and the prescribed additional compensation at the specified multiple of the regular rate for every such hour in excess of the applicable maximum workweek, it is possible, depending on the length of the workweek, that the pay in the nonexempt job may exceed the salary paid in the exempt job for the identical number of hours worked. For these reasons, a comparison of exempt and nonexempt jobs requires careful examination of all the facts and does not lend itself to the application of any general rules.

EQUAL SKILL

§ 800.125 Jobs requiring equal skill in performance.

The jobs to which the equal pay standard is applicable are jobs requiring equal skill in their performance. Where the amount or degree of skill required to perform one job is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Skill includes consideration of such factors as experience, training, education, and ability. It must be measured in terms of the performance requirements of the job. If an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the Act as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his working time as the employee in the other job. Possession of a skill not needed to meet requirements of the job cannot be considered in making a determination regarding equality of skill. The efficiency of the employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill.

§ 800.126 Comparing skill requirements of jobs.

As a simple illustration of the principle of equal skill, suppose that a man and a woman have jobs classified as typists. Both jobs require them to spend two-thirds of their working time in typing and related activities, such as proofreading and filing, and the remaining one-third in diversified tasks, not necessarily the same. Since there is no difference in the skills required for most of their work, whether or not these jobs require equal skill in performance will depend upon the nature of the work the employees must actually perform during this latter period to meet the requirements of the jobs. If it happens that the man, during the remaining one-third of the time, spends twice as much time operating a calculator as does the woman who prefers and is allowed to do most of the copying work required in the office, this would not preclude a conclusion that the performance of the two jobs requires equal skill if there is actually no distinction in the performance requirements of such jobs so far as the skills utilized in these tasks are concerned. Even if the man were required to do all of the calculating work in order to perform his job, it is not at all apparent that the jobs would require substantially different degrees of skill unless it should appear that operation of that calculator requires more training and can command a higher wage than the typing and related work performed by both the man and the woman, and that the work required to be done by the woman in the remaining one-third of the time requires less training and is recognized as commanding a lower wage whether performed by a man or a woman.

EQUAL EFFORT

§ 800.127 Jobs requiring equal effort in performance.

The jobs to which the equal pay standard is applicable are jobs that require equal effort to perform. Where substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Where jobs are otherwise equal under the Act, and there is no substantial difference in the amount or degree of effort which must be expended in performing the jobs under comparison, the jobs may require equal effort in their performance even though the effort may be exerted in different ways on the two jobs. Differences only in the kind of effort required to be expended in such a situation will not justify wage differentials.

§ 800.128 Comparing effort requirements of jobs.

To illustrate the principle of equal effort exerted in different ways, suppose that a male checker employed by a supermarket is required to spend part of his time carrying out heavy packages or replacing stock involving the lifting of heavy items whereas a female checker is required to devote an equal degree of effort during a similar portion of her time to performing fill-in work requiring greater dexterity—such as rearranging displays of spices or other small items. The difference in kind of effort required of the employees does not appear to make their efforts unequal in any respect which would justify a wage differential, where such differences in kind of effort expended to perform the job are not ordinarily considered a factor in setting wage levels. Further, the occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort. Suppose, however, that men and women are working side by side on a line assembling parts. Suppose further that one of the men who performs the operations at the end of the line must also lift the assembly, as he completes his part of it, and place it on a waiting pallet. In such a situation, a wage rate differential might be justified for the person (but only for the person) who is required to expend the extra effort in the performance of his job, provided that the extra effort so expended is substantial and is performed over a considerable portion of the work cycle. However, a serious question would be raised about the bona fides of a wage differential if it is paid to a male employee who is otherwise performing equal work with female employees on the basis that the male is required to do some heavy lifting, unless a similar distinction in wage rates is made in the establishment as between male employees only where some do heavy lifting and others do not. In general, a wage rate differential based on differences in the degree or amount of effort required for performance of jobs must be applied uniformly to men and women. For example, if all women and some of the men performing a particular type of job do not perform heavy lifting, and some men do, payment of a higher wage rate to all of the men than to the women would constitute a prohibited wage rate differential if the equal pay provisions otherwise apply.

EQUAL RESPONSIBILITY

§ 800.129 Jobs requiring equal responsibility in performance.

The jobs to which the equal pay standard applies are jobs in the performance of which equal responsibility is required. Responsibility is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations. The following illustrations in § 800.130, which are by no means exhaustive, may suggest the nature or degree of differences in responsibility which will constitute unequal work.

§ 800.130 Comparing responsibility requirements of jobs.

(a) There are many situations where one employee of a group performing jobs which are equal in other respects is required from time to time to assume supervisory duties for reasons such as the absence of the regular supervisor. Suppose, for instance, that it is the employer's practice to pay a higher wage rate to such a "relief" supervisor with the understanding that during the intervals in which he performs supervisory duties he is in training for a supervisory position. In such a situation, payment of the higher rate to him might well be based solely on the additional responsibility required to perform his job and the equal pay provisions would not require the same rates to be paid to an employee of the opposite sex in the group who does not have an equal responsibility. There would clearly be no question concerning such a wage rate differential if the employer pays the higher rate to both men and women who are called upon from time to time to assume such supervisory responsibilities.

(b) Other differences in responsibilities of employees in generally similar jobs may require similar conclusions. Sales clerks, for example, who are engaged primarily in selling identical or similar merchandise may be given different responsibilities. Suppose that one employee of such a group (who may be either a man or a woman) is authorized and required to determine whether to accept payment for purchases by personal checks of customers. The person having this authority to accept personal checks may have a considerable additional degree of responsibility which may materially affect the business operations of the employer. In this situation, payment of a higher wage rate to this employee would be permissible.

(c) On the other hand, there are situations where one employee of the group may be given some minor responsibility which the others do not have (e.g., turning out the lights in his department at the end of the business day) but which is not of sufficient consequence of importance to justify a finding of unequal responsibility. As another example of a minor difference in responsibility, suppose that office employees of both sexes work in jobs essentially alike but at certain intervals a male and female employee performing otherwise equal work within the meaning of the statute are responsible for the office payroll. One of these employees may be assigned the job of checking time cards and compiling the payroll list. The other, of the opposite sex, may be required to make out paychecks, or divide up cash and put the proper amounts into pay envelopes after drawing a payroll check. In such circumstances, although some of the employees' duties are occasionally dissimilar, the difference in responsibility involved would not appear to be of a kind that is recognized in wage administration as a significant factor in determining wage rates. Under such circumstances, this difference would seem insufficient to justify a wage rate differential between the man's and the woman's job if the equal pay provisions otherwise apply.

SIMILAR WORKING CONDITIONS

§ 800.131 Jobs performed under similar working conditions.

In order for the equal pay standard to apply, the jobs must be performed under similar working conditions. It should be noted that the statute adopts the flexible standard of similarity as a basis for testing this requirement. In determining whether the requirement is met, a practical judgment is required in the light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels. The mere fact that jobs are in different departments of an establishment will not necessarily mean that the jobs are performed under dissimilar working conditions. This may or may not be the case.

§ 800.132 Determining similarity of working conditions.

Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions. However, in situations where some employees performing work meeting these standards have working conditions substantially different from those required for the performance of other jobs the equal pay principle would not apply. For example, if some sales persons are engaged in selling a product exclusively inside a store and others employed by the same establishment spend a large part of their time selling the same product away from the establishment, the working conditions would be dissimilar. Also, where some employees do repair work exclusively inside a shop while others employed by the shop spend most of their time doing similar repair work in customers' homes, there would not be similarity in working conditions. On the other hand, slight or inconsequential differences in working conditions that are essentially similar would not justify a differential in pay. Such differences are not usually taken into consideration by employers or in collective bargaining in setting wage rates.

EXCEPTIONS TO EQUAL PAY STANDARD

§ 800.140 The specified exceptions.

Section 6(d)(1) of the Act provides three specific exceptions and one broad general exception to its general standard requiring that employees doing equal work be paid equal wages, regardless of sex. Under these exceptions, where it can be established that a differential in pay is the result of a wage payment made pursuant to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or that the differential is based on any other factor other than sex, the differential is expressly excluded from the statutory prohibition of wage discrimination based on sex. The legislative intent was stated to be that any discrimination based upon any of these exceptions shall be exempted from the operation of the statute. These exceptions recognize, as do the reports of the legislative committees, that there are factors other than sex that can be used to justify a wage differential even as between employees of opposite sexes performing equal work on jobs which meet the statutory tests of equal skill, effort, and responsibility and similar working conditions. (See H. Rept. No. 309, S. Rept. No. 176, 88 Congress 1st sess.)

§ 800.141 Establishing application of an exception.

(a) The facts necessary to establish that a wage differential has a basis specified in any of the foregoing exceptions are peculiarly within the knowledge of the employer. If he relies on the excepting language to exempt a differential in pay from the operation of the equal pay provisions, he will be expected to show the necessary facts. Thus, such a showing will be required to demonstrate that a payment of wages to employees at a rate less than the rate at which he pays employees of the opposite sex is based on a factor other than sex where it appears that such payments are for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions within the meaning of the statute. After careful examination of the legislative history and the judicial precedents, this is believed to be the most reasonable construction of the law and the one which will be approved by the courts. However, because these is some legislative history that could support a different view, the reasons for reaching the foregoing conclusions are explained in some detail in paragraph (b) of this section.

(b) The legislative history of the Equal Pay Act amendments to the Fair Labor Standards Act includes some statements in the House debate by a member of the House committee who was an active sponsor of the legislation in the form approved by the committee, expressing a view differing from that stated in paragraph (a) of this section. The opinion expressed in these statements appears to be that the burden of establishing a prima facie case of violation of the equal pay provisions includes not only a showing of the facts necessary to establish a failure to comply with the Act's general standard, but also a showing that no facts exist that could bring the wage differential within an exception. In this view, the employer would not have to show facts necessary to prove the exception as an affirmative defense (Daily Congressional Record, House, May 23, 1963, p. 8698). But if the exceptions are intended to have an exempting effect, as was indicated by House committee spokesmen (H. Rept. No. 309, 88th Cong., 1st sess., p. 3; statement of Subcommittee Chairman Thompson, Daily Congressional Record, House, May 23, 1963, p. 8685), it seems plain that a view such as that expressed above is not consistent with the general rule established by the courts that the application of an exemption under this Act is a matter of affirmative defense and the employer urging such an exemption has the burden of showing that it applies. (See *Phillips* v. *Walling,* 334 U.S. 490; *Arnold* v. *Kanowsky,* 361 U.S. 388; *Walling* v. *General Industries Co.,* 330 U.S. 545; *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290.) On balance, it would be difficult to conclude from the legislative history that it was the intent of Congress to supersede this established rule by applying a different rule to these provisions than to other exemptions from section 6 or 7. The House committee report emphasized that the "now familiar system of * * * administration, and enforcement, * * * will be utilized fully to complement the new provision" and many statements in the legislative debates as well as the report of the Senate committee further indicate a well-understood legislative intent to apply and enforce the equal pay provisions in a manner consistent with the familiar procedures traditionally followed under the Act in the administration and enforcement of its labor standards. (H. Rept. No. 309, S. Rept. No. 176, 88th Cong. 1st sess.; Daily Congressional Record, House, May 23, 1963, pp. 8692, 8705; Daily Congressional Record, Senate, May 28, 1963, pp. 9219-9220.) Also pertinent is the understanding expressed by the House sponsors that a "bona fide program" that "does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination" (H. Rept. No. 309 88th Cong. 1st sess.; Daily Congressional Record, House, May 23, 1963, p. 8685) and the clarifying remarks of the subcommittee chairman managing the House-passed legislation in the Senate, who said: "The employer's defense, if it is based on an employer's plan, must be a bona fide one; and the burden of demonstrating the legitimacy of that defense will rest upon the employer." (Daily Congressional Record, Senate, May 28, 1963, p. 9219.) On review of the legislative history as a whole, therefore, the most reasonable conclusion appears to be that the position expressed in paragraph (a) of this section is the better view, and that it is consistent with the legislative intent to consider the statutory exceptions, like other exemptions from section 6, as matters of affirmative defense and to require an employer who believes he comes within them to show facts establishing that this is so.

§ 800.142 Sex must not be a factor in excepted wage differentials.

While differentials in the payment of wages are permitted when it can be shown that they are based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex, the requirements for such an exception are not met unless the factor of sex provides no part of the basis for the wage differential. If these conditions are met, the fact that application of the system for measuring earnings results in higher average earnings for employees of one sex than for employees of the opposite sex performing equal work would not constitute a probibited wage differential. However, to come within the exempting provisions, any system or factor of the type described pursuant to which a wage rate differential is paid must be applied equally to men and women whose jobs require equal skill, effort, and responsibility and are performed under similar working conditions. Any evaluation, incentive, or other payment plan which establishes separate and different "male rates" and "female rates" without regard to job content will be carefully examined to determine if these rate differentials are based on sex in violation of the equal pay requirements.

§ 800.143 Establishing absence of sex as a factor.

A showing that a wage differential is based on a factor other than sex, so as to come within one of the exceptions in section 6(d)(1), may sometimes be incomplete without a showing that there is a reasonable relationship between the amount of the differential and the weight properly attributable to the factor other than sex. To illustrate, suppose that male clerks who work 40 hours each week and female clerks who work 35 hours each week are performing equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. If they are paid weekly salaries for this work a differential in the amounts could be justified as based on a difference in hours of work, a difference based on a factor other than sex which the chairman of the House subcommittee stated would "be exempted under this act." (Daily Congressional Record, House, p. 8685, May 23, 1965.) But if the difference in salaries paid is too great to be accounted for by the difference in hours of work as where the male clerks are paid $90 for their 40-hour week (equal to $2.25 an hour) and the female clerks receive only $70 for their 35-hour week (equal to $2.00 an hour), then it would seem necessary to show some other factor other than sex as the basis for the unexplained portion of the wage differential before a conclusion that there is no wage discrimination based on sex would be warranted. To illustrate further, a compensation plan which provides for a higher rate of commission, "draw", advance or guarantee for sales employees of one sex than for employees of the opposite sex performing "equal work" would be in violation of the equal pay provisions of the Act if the plan is applied equally to each that the differential in pay is pursuant to a seniority system, a merit system, or a system measuring earnings by quantity or quality of production, or is based on any other factor other than sex. A compensation plan which provides for a "draw" based on a percentage of each employee's earnings during a specified prior period would not be in violation of the equal pay provisions of the Act if the plan is applied equally to men and women. However, for all men to receive a higher draw, because it is the employer's experience that men generally earn more in commission than women would not be sufficient indication that the differential is based on a factor other than sex.

§ 800.144 Excepted "systems".

The exceptions for a seniority "system", a merit "system", and a "system" for measuring earnings by quantity or quality of work are not restricted to, although they include, formal systems or systems or plans that are reduced to writing. Such formal or written systems or plans may, of course, provide better evidence of the actual factors which provide a basis for a wage differential, but any informal or unwritten system or plan which can be shown to provide the basis for differentials in wage rates because of seniority, merit, or quantity or quality of production may qualify under the statutory language if it can be demonstrated that the standards or criteria applied under it are applied pursuant to an established plan the essential terms and conditions of which have been communicated to the affected employees.

§ 800.145 Application of exceptions illustrated—in general.

When applied without distinction to employees of both sexes, shift differentials, incentive payments, production bonuses, performance and longevity raises and the like will not result in equal pay violations. For example, in an establishment where men and women are employed on a job, but only men work on the night shift for which a night shift differential is paid, such a differential would not be prohibited. However, the payment of a higher hourly rate to all men on that job for all hours worked because some of the men may occasionally work nights would result in a prohibited wage differential. The examples (in the sections following) illustrate a few applications of the exception provisions.

§ 800.146 Examples—"red circle" rates, in general.

The term "red circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. An example of the use of a "red circle" rate might arise in a situation where a company wishes to transfer a long-service male employee, who can no longer perform his regular job because of ill health, to different work which is now being performed by women. Under the "red circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red circled" in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure.

§ 800.147 Examples—temporary reassignments.

For a variety of reasons an employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for his regular job is higher than the rate usually paid for the work to which he is temporarily reassigned, the employer may continue to pay him the higher rate, under the "red circle" principle. For instance, an employer who must reduce help in a skilled job may transfer employees to less demanding work without reducing their pay, in order to have them available when they are again needed for their former jobs. Although employees traditionally engaged in performing the less demanding work would be paid at a lower rate than those employees transferred from the more skilled jobs; the resultant wage differential would not constitute a violation of the equal pay provisions since the differential is based on factors other than sex. This would be true during the period of time for which the "red circle" rate is bona fide. (See § 800.146) Temporary reassignments may also involve the opposite relationship of wage rates. Thus, an employee may be required, during the period of temporary reassignment, to perform work for which employees of the opposite sex are paid a higher wage rate than that paid for the duties of the employee's regular job classification. In such a situation, the employer may continue to pay the reassigned employee at the lower rate, if the rate is not based on quality or quantity of production, and if the reassignment is in fact a temporary one. If a piece rate is paid employees of the opposite sex who perform the work to which the employee in question is reassigned, failure to pay that employee the same piece rate paid such other employees would raise questions of discrimination based on sex. Also, failure to pay the higher rate to the reassigned employee after it becomes known that the reassignment will not be of a temporary nature would raise a question whether sex rather than the temporary nature of the assignment is the real basis for the wage differential. Generally, failure to pay the higher rate for a period longer than one month will raise questions as to whether the reassignment was in fact intended to be a temporary one.

§ 800.148 Examples—training programs.

Employees employed under a bona fide training program may, in the furtherance of their training, be assigned from time to time to various types of work in the establishment. At such times, the employee in training status may be performing equal work with nontrainees of the opposite sex whose wages or wage rates may be unequal to those of the trainee. Under these circumstances, provided the rate paid to the employee in training status is paid, regardless of sex, under the training program, the differential can be shown to be attributable to a factor other than sex and no violation of the equal pay standard will result. Training programs which appear to be available only to employees of one sex will, however, be carefully examined to determine whether such programs are, in fact, bona fide. In an establishment where a differential is paid to employees of one sex because, traditionally, only they have been considered eligible for promotion to executive positions, such a practice, in the absence of a bona fide training program, would be a discrimination based on sex and result in a violation of the equal pay provisions, if the equal pay standard otherwise applies.

§ 800.149 Examples—"head of household".

Sometimes differentials in pay to employees performing equal work are said to be based on the fact that one employee is head of a household and the other, of the opposite sex, is not. In general, such allegations have not been substantiated. Experience indicates that where such factor is claimed the wage differentials tend to be paid to employees of one sex only, regardless of the fact that employees of the opposite sex may bear equal or greater financial responsibility as head of a household or for the support of parents or other family dependents. Accordingly, since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a "head of household" or "head of family" status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator is that they are not prepared to conclude that any differential allegedly based on such status is based on a "factor other than sex" within the intent of the statute.

§ 800.150 Examples—temporary and part-time employees.

The payment of different wage rates to permanent employees than to temporary employees such as may be hired during the Christmas season would not necessarily be a violation of the equal pay provisions even though equal work is performed by both groups of workers. For example, no violation would result where payment of such a differential conforms with the nature and duration of the job and with the customary practice in the industry and the establishment, and the pay practice is applied uniformly to both men and women. Generally, employment for a period longer than one month will raise questions as to whether the employment is in fact temporary. Likewise, the payment of a different wage to employees who work only a few hours a day than to employees of the opposite sex who work a full day will not necessarily involve noncompliance with the equal pay provisions, even though both groups of workers are performing equal work in the same establishment. No violation of the equal pay standards would result if, for example, the difference in working time is the basis for the pay differential, and the pay practice is applied uniformly to both men and women. However, if employees of one sex work 30 to 35 hours a week and employees of the other sex work 40 to 45 hours, a question would be raised as to whether the differential is not in fact based on sex since different rates for part-time work are usually for workweeks of 20 hours or less.

§ 800.151 Examples—employment cost factors.

A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

[31 FR 2657, Feb. 11, 1966]

RELATION TO OTHER LAWS

§ 800.160 Relation to other pay laws.

The provisions of various State or other equal pay laws may differ from the equal pay provisions set forth in the Fair Labor Standards Act. There is also other Federal legislation which deals broadly with discrimination by employers against individuals because of sex including discrimination on such grounds with respect to compensation for employment (see Civil Rights Act of 1964, 78 Stat. 241, Title VII). Where any such legislation and the equal pay provisions of the Fair Labor Standards Act both apply the principle established in section 18 of the latter Act will be controlling. No provisions of the Fair Labor Standards Act will excuse noncompliance with any State or other law establishing equal pay standards higher than the equal pay standards provided by section 6(d) of the Fair Labor Standards Act. On the other hand, compliance with other applicable legislation will not excuse noncompliance with the equal pay provisions of the Fair Labor Standards Act.

§ 800.161 Higher State minimum wage.

State laws providing minimum wage requirements may affect the application of the equal pay provisions of the Fair Labor Standards Act. If a higher minimum wage than that required under the Act is applicable to a particular sex pursuant to State law, and the employer pays the higher State minimum wage to male or female employees, he must also pay the higher rate to employees of the opposite sex for equal work in order to comply with the equal pay provisions of the Act.

§ 800.162 Overtime payments required by State law.

The application of the equal pay provisions of the Act may also be affected by State legal requirements with respect to overtime pay. If as a result of a State law, female employees in an employer's establishment are paid overtime premiums for hours worked in excess of a prescribed maximum in any workday or workweek, the employer must pay male employees performing equal work in such establishment the same overtime premiums when they work such excess hours, in order to comply with the equal pay provisions of the Fair Labor Standards Act. This would be true even though both the male and the female employees performing equal work are otherwise qualified for exemption from the overtime pay requirements of section 7 of the Fair Labor Standards Act. It would not be true, however, unless the overtime requiring the premium pay is actually being worked by the women.

§ 800.163 Other laws not applying equally to employment of both sexes.

In making a determination as to the application of the equal pay provisions of the Fair Labor Standards Act, legal restrictions in State or other laws upon the employment of individuals of a specified sex, with respect to such matters as hours of work, weightlifting, rest periods, or other conditions of such employment, will not be deemed to make otherwise equal work unequal or be considered per se as justification for an otherwise prohibited differential in wage rates. For example, under the Act, the fact that a State law limits the weights which women are permitted to lift would not justify a wage differential in favor of all men regardless of job content. The Act would not prohibit a wage differential paid to male employees whose weightlifting activities required by the job involve so significant a degree of extra effort as to warrant a finding that their jobs and those of female employees doing similar work do not involve equal work within the meaning of the Act. However, the fact that there is an upper limit set by State law on the weights that may be lifted by women would not justify a wage differential to male employees who are not regularly required to lift substantially greater weights or expend the extra effort necessary to make the jobs unequal. The requirement of equal pay in such situations depends on whether the employees involved are actually performing "equal work" as defined in the Act, rather than on legal restrictions which may vary from State to State.

ENFORCEMENT

§ 800.164 Investigations and compliance assistance.

The Wage and Hour Division is charged with the administration of the Fair Labor Standards Act, including the equal pay provisions. Investigations under the Act will therefore include such inquiry as may be necessary to obtain compliance with the equal pay provisions in cases where they are applicable. As provided in section 11(a) of the Act, authorized representatives of the Divisions may investigate and gather data regarding the wages, hours and other conditions and practices of employment. They may enter establishments and inspect the premises and records, transcribe records and interview employees. They may investigate whatever facts, conditions, practices or matters are considered necessary to find out whether any person has violated any provisions of the Act or which may aid in enforcement of the Act. Wage-Hour investigators will advise employers regarding any changes necessary or desirable regarding payroll, recordkeeping and other personnel practices which will aid in achieving and maintaining compliances with the law. Complaints, records, and other information obtained from employers and employees are treated confidentially.

§ 800.165 Recordkeeping requirements.

Records required to be kept by employers having employees subject to the equal pay provisions under section 6(d) of the Act are set forth in §§ 516.2, 516.6, and 516.29 of this chapter.

§ 800.166 Recovery of wages due; injunctions; penalties for willful violations.

(a) Pursuant to section 6(d)(3) of the Act, wages withheld in violation of the equal pay provisions have the status of unpaid minimum wages or unpaid overtime compensation under the Fair Labor Standards Act. This is true both of the additional wages required by the Act to be paid to an employee to meet the equal pay standard, and of any wages that the employer should have paid an employee whose wages he reduced in violation of the Act in an attempt to equalize his pay with that of an employee of the opposite sex performing equal work, on jobs subject to the equal pay standards.

(b) The following methods are provided under section 16 and 17 of the Act for recovery of unpaid wages: The Administrator of the Wage and Hour Division may supervise payment of the back wages and, in certain circumstances, the Secretary of Labor may bring suit for back pay upon the written request of the employee. The employee may sue for back pay and an additional sum up to the amount of back pay, as liquidated damages, plus attorney's fees and court costs. The employee may not bring suit if he has been paid back wages under supervision of the Administrator, or if the Secretary has filed suit to collect the wages. The Secretary may also obtain a court injunction to restrain any person from violating the law, including the unlawful withholding by an employer of proper compensation. A 2-year statute of limitations applies to the recovery of unpaid wages, except that an action on a cause of action arising out of a willful violation may be commenced within 3 years after the cause of action accrued.

(c) Willful violations of the Act may be prosecuted criminally and the violator fined up to $10,000. A second conviction for such a violation may result in imprisonment.

(d) The equal pay provisions are an integral part of section 6 of the Act, violation of any provision of which by any person, including any labor organization or agent thereof, is unlawful, as provided in section 15(a) of the Act. Accordingly, any labor organization, or agent thereof, who violates any provision of section 6(d) of the Act is subject to injunction proceedings in accordance with the applicable provisions of section 17 of the Act. Any such labor organization, or agent thereof, who willfully violates the provisions of section 15 is also liable to the penalties set forth in section 16(a) of the Act.

[30 FR 11504, Sept. 9, 1965, as amended at 32 FR 2381, Feb. 3, 1967]

SUBCHAPTER C—AGE DISCRIMINATION IN EMPLOYMENT

PART 860—INTERPRETATIONS

Sec.

860.1 Purpose of this part.
860.20 Geographical scope of coverage.
860.30 Definitions.
860.31 "Employer."
860.35 "Employment agency."
860.36 Employment agencies—prohibitions.
860.50 "Compensation, terms, conditions, or privileges of employment * * *".
860.75 Wage rate reduction prohibited.
860.91 Discrimination within the age bracket of 40-65.
860.92 Help wanted notices or advertisements.
860.95 Job applications.
860.102 Bona fide occupational qualifications.
860.103 Differentiations based on reasonable factors other than age.
860.104 Differentiations based on reasonable factors other than age—Additional examples.
860.105 Bona fide seniority systems.
860.106 Bona fide apprenticeship programs.
860.110 Involuntary retirement before age 65.
860.120 Costs and benefits under employee benefit plans.

AUTHORITY: 81 Stat. 602; 29 U.S.C. 620, 5 U.S.C. 301, Secretary's Order No. 10-68, and Secretary's Order No. 11-68.

§ 860.1 Purpose of this part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (*Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[33 FR 9172, June 21, 1968]

§ 860.20 Geographical scope of coverage.

The prohibitions in section 4 of the Act are considered to apply only to performance of the described discriminatory acts in places over which the United States has sovereignty, territorial jurisdiction, or legislative control. These include principally the geographical areas set forth in the definition of the term "State" in section 11(i). There, the term State is defined to include "a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act." Activities within such geographical areas which are discriminatory against protected individuals or employees are within the scope of the Act even though the activities are related to employment outside of such geographical areas.

[34 FR 322, Jan. 9, 1969]

§ 860.30 Definitions

Considering the purpose of the proviso to section 7(c) of the Act as indicated in the reports of both the Senate and House Committees (see S. Rept. No. 723, 90th Cong. 1st Sess., and H. Rept. No. 805, 90th Cong., 1st Sess.) it was clearly the intent of Congress that the term "employee" in that proviso should apply to any person who has a right to bring an action under the Act, including an applicant for employment.

[34 FR 9708, June 21, 1969]

§ 860.31 "Employer."

Section 11(b) defines "employer" to mean "* * * a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year: * * * The term also means any agent of such a person, but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof."

[37 FR 13345, July 7, 1972]

§ 860.35 "Employment agency."

(a) Section 11(c) defines "employment agency" to mean "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance."

(b) As long as an employment agency regularly procures employees for at least one covered employer, it qualifies under section 11(c) as an employment agency with respect to all of its activities whether they be for covered or noncovered employers.

[37 FR 13345, July 7, 1972]

§ 860.36 Employment agencies—prohibitions.

(a) Section 4(b) provides that "It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age."

(b) Since a covered employment agency is subject to the prohibitions of the Act even when acting on behalf of noncovered employers (see § 860.35(b)), it may not discriminate contrary to the statute with respect to any referrals it makes.

(c) The prohibitions of section 4(b) apply not only to the referral activities of a covered employment agency but also to the agency's own employment practices, regardless of the number of employees the agency may have. This is so because section 4(b) makes it unlawful for a covered employment agency "otherwise to discriminate against" any individual between 40 and 65 because of age. To illustrate, a covered employment agency's use of an age preference of "not over 35" in an advertisement seeking employees for itself is unlawful since such preference discriminates against individuals in the 40 to 65 age bracket.

[37 FR 13345, July 7, 1972]

§ 860.50 "Compensation, terms, conditions, or privileges of employment * * *".

(a) Section 4(a)(1) of the Act specifies that it is unlawful for an employer "to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age".

(b) The term "compensation" includes all types and methods of remuneration paid to or on behalf of or received by an employee for his employment.

(c) The phrase "terms, conditions, or privileges of employment" encompasses a wide and varied range of job-related factors including, but not limited to, job security, advancement, status, and benefits. The following are examples of some of the more common terms, conditions, or privileges of employment: The many and varied employee advantages generally regarded as being within the phrase "fringe benefits," promotion, demotion or other disciplinary action, hours of work (including overtime), leave policy (including sick leave, vacation, holidays), career development programs, and seniority or merit systems (which govern such conditions as transfer, assignment, job retention, layoff and recall). An employer will be deemed to have violated the Act if he discriminates against any individual within its protection because of age with respect to any terms, conditions, or privileges of employment, such as the above, unless a statutory exception applies.

[33 FR 12227, Aug. 30, 1968]

§ 860.75 Wage rate reduction prohibited.

Section 4(a)(3) of the Act provides that where an age-based wage differential is paid in violation of the statute, the employer cannot correct the violation by reducing the wage rate of any employee. Thus, for example, in a situation where it has been determined that an employer has violated the Act by paying a 62-year-old employee a prohibited wage differential of 50 cents an hour less than he is paying a 30-year-old worker, in order to achieve compliance with the Act he must raise the wage rate of the older employee to equal that of the younger worker. Furthermore, the employer's obligation to comply with the statute cannot be avoided by transferring either the older or the younger employee to other work since the transfer itself would appear discriminatory under the particular facts and circumstances.

[34 FR 322, Jan. 9, 1969]

§ 860.91 Discrimination within the age bracket of 40–65.

(a) Although section 4 of the Act broadly makes unlawful various types of age discrimination by employers, employment agencies, and labor organizations, section 12 limits this protection to individuals who are at least 40 years of age but less than 65 years of age. Thus, for example it is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age to an individual 30 years old over another individual who is within the 40–65 age bracket limitation of section 12. Similarly, an employer will have violated the Act, in situations where it applies, when one individual within the age bracket of 40–65 is given job preference in hiring, assignment, promotion or any other term, condition, or privilege of employment, on the basis of age, over another individual within the same age bracket.

(b) Thus, if two men apply for employment to which the Act applies, and one is 42 and the other 52, the personnel officer or employer may not lawfully turn down either one on the basis of his age; he must make his decision on the basis of other factors, such as the capabilities and experience of the two individuals. The Act, however, does not restrain age discrimination between two individuals 25 and 35 years of age.

[33 FR 9172, June 21, 1968]

§ 860.92 Help wanted notices or advertisements.

(a) Section 4(e) of the Act prohibits "an employer, labor organization, or employment agency" from using printed or published notices or advertisements indicating any preference, limitation, specification, or discrimination, based on age.

(b) When help wanted notices or advertisements contain terms and phrases such as "age 25 to 35," "young," "boy," "girl," "college student," "recent college graduate," or others of a similar nature, such a term or phrase discriminates against the employment of older persons and will be considered in violation of the Act. Such specifications as "age 40 to 50," "age over 50," or "age over 65" are also considered to be prohibited. Where such specifications as "retired person" or "supplement your pension" are intended and applied so as to discriminate against others within the protected group, they too are regarded as prohibited, unless one of the exceptions applies.

(c) However, help wanted notices or advertisements which include a term or phrase such as "college graduate," or other educational requirement, or specify a minimum age less than 40, such as "not under 18", or "not under 21," are not prohibited by the statute.

(d) The use of the phrase "state age" in help wanted notices or advertisements is not, in itself, a violation of the statute. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate a discrimination based on age, employment notices or advertisements which include the phrase "state age," or any similar term, will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the statute.

(e) There is no provision in the statute which prohibits an individual seeking employment through advertising from specifying his own age.

[33 FR 9172, June 21, 1968, as amended at 34 FR 9708, June 21, 1969]

§ 860.95 Job applications.

(a) The term "job applications," within the meaning of the recordkeeping regulations under the Act (Part 850 of this chapter), refers to all inquiries about employment or applications for employment or promotion including, but not limited to, resumes or other summaries of the applicant's background. It relates not only to preemployment inquiries but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the statute. As in the case with help wanted notices or advertisements (see § 860.92), a request on the part of an employer, employment agency, or labor organization for information such as "Date of Birth" or "State Age" on an employment application form is not, in itself, a violation of the Age Discrimination in Employment Act of 1967. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate a discrimination based on age, employment application forms which request such information in the above, or any similar phrase, will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the statute. That the purpose is not prescribed by the statute should be made known to the applicant, as by a referee on the application form to the statutory prohibition in language to the following effect: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 65 years of age."

(b) An employer may limit the active period of consideration of an application so long as he treats all applicants alike regardless of age. Thus, for example, if the employer customarily retains employment applications in an active status for a period of 60 days, he will be in compliance with the Act if he so retains those of individuals in the 40 to 65 age group for an equal period of consideration as those of younger persons. Further, there is no objection to the employer advising all applicants of the above practice by means of a legend on his application forms as long as this does not suggest any limitation based on age. If it develops, however, that such a legend is used as a device to avoid consideration of the applications of older persons, or otherwise discriminate against them because of age, there would then appear to be a violation of the Act. It should be noted that this position in no way alters the recordkeeping requirements of the Act which are set forth in Part 850 of this chapter.

[33 FR 12227, Aug. 20, 1968, as amended at 34 FR 9708, June 21, 1969]

§ 860.102 Bona fide occupational qualifications.

(a) Section 4(f)(1) of the Act provides that "it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *"

(b) Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business", will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

(c) The following are illustrations of possible bona fide occupational qualifications.

(d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public. This exception would apply, for example, to airline pilots within the jurisdiction of the Federal Aviation Agency. Federal Aviation Agency regulations do not permit airline pilots to engage in carrier operations, as pilots, after they reach age 60.

(e) A bona fide occupational qualification will also be recognized in certain special, individual occupational circumstances, e.g., actors required for youthful or elderly characterization or roles, and persons used to advertise or promote the sale of products designed for, and directed to appeal exclusively to, either youthful or elderly consumers.

[33 FR 9172, June 21, 1968]

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(1)(i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however.* That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, where as another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the indi-

vidual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do no have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation—an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 FR 9173, June 21, 1968]

§ 860.104 Differentiations based on reasonable factors other than age—Additional examples.

(a) *Employment of Social Security recipients.* (1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) *Employee testing.* The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) *Refusal to hire relatives of current employees.* There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 FR 322, Jan. 9, 1969, as amended at 34 FR 9709, June 21, 1969]

§ 860.105 Bona fide seniority systems.

Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of a bona fide seniority system * * * which is not a subterfuge to evade the purposes of this Act * * *."

(a) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers. In this regard, it should be noted that a bona fide seniority system may operate, for example, on an occupational, departmental, plant, or company wide unit basis.

(b) Seniority systems not only distinguish between employees on the basis of their length of service, they normally afford greater rights to those who have the longer service. Therefore, adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the Act, may, depending upon the circumstances, be a "subterfuge to evade the purposes" of the Act. Furthermore, a seniority system which has the effect of perpetuating discrimination which may have existed on the basis of age prior to the effective date of the Act will not be recognized as "bona fide."

(c) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will also be regarded as lacking the necessary bona fides to qualify for the exception.

(d) It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex or national origin, are prohibited under Title VII of the Civil Rights Act of 1964, where that Act otherwise applies. Neither will such systems be regarded as "bona fide" within the meaning of section 4(f)(2) of the Age Discrimination in Employment Act of 1967.

[33 FR 12227, Aug. 30, 1968]

§ 860.106 Bona fide apprenticeship programs.

Age limitations for entry into bona fide apprenticeship programs were not intended to be affected by the Act. Entry into most apprenticeship programs has traditionally been limited to youths under specified ages. This is in recognition of the fact that apprenticeship is an extension of the educational process to prepare young men and women for skilled employment. Accordingly, the prohibitions contained in the Act will not be applied to bona fide apprenticeship programs which meet the standards specified in §§ 521.2 and 521.3 of this chapter.

[34 FR 323, Jan. 9, 1969]

§ 860.110 Involuntary retirement before age 65.

(a) Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar, as the exception provided in section 4(f)(2) is concerned.

(b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program. It should be noted that section 5 of the Act directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress.

[34 FR 9709, June 21, 1969]

§ 860.120 Costs and benefits under employee benefit plans.

(a) (1) *General.* Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals." The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception: (i) What a "bona fide employee benefit plan" is; (ii) what it means to "observe the terms" of such a plan; and (iii) what kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of [the] Act." There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans. For a discussion of the provisions in section 4(f)(2) forbidding the failure to hire any individual or the involuntary retirement of any individual, see § 860.110 of this chapter.

(2) *Relation of section 4(f)(2) to sections 4(a), 4(b) and 4(c).* Sections 4(a), 4(b) and 4(c) prohibit specified acts of discrimination on the basis of age. Section 4(a) in particular makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * *." Section 4(f)(2) is an exception to this general prohibition. Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).

(b) *"Bona fide employee benefit plan."* Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered "bona fide" if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations thereunder. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits." The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of the exception have been met. An "employee-pay-all" employee benefit plan is one of the "terms, conditions, or privileges of employment" with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the extent and according to the same principles as apply to other plans under section 4(f)(2).

(c) *"To observe the terms" of a plan.* In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in "observ[ance of] the terms of" the plan. As this statutory text makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

(d) *"Subterfuge."* In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be "a subterfuge to evade the purposes of [the] Act." In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations. (The only exception to this general rule is with respect to certain retirement plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below.

(1) *Cost data—General.* Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years. An employer may rely in cost data for its own employees over such a period, or on cost data for a larger group of similarly situated employees. Sometimes, as a result of experience rating or other causes, an employer incurs costs that differ significantly from costs for a group of similarly situated employees. Such an employer may not rely on cost data for the similarly situated employees where such reliance would result in significantly lower benefits for its own older employees. Where reliable cost information is not available, reasonable projections made from existing cost data meeting the standards set forth above will be considered acceptable.

(2) *Cost data—Individual benefit basis and "benefit package" basis.* Cost comparisons and adjustments under section 4(f)(2) must be made on a benefit-by-benefit basis or on a "benefit package" basis, as described below.

(i) *Benefit-by-benefit basis.* Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See § 860.120(f)(1) of this section.

(ii) *"Benefit package" basis.* As an alternative to the benefit-by-benefit basis, cost comparisons and adjustments under section 4(f)(2) may be made on a limited "benefit package" basis. Under this approach, subject to the limitations described below, cost comparisons and adjustments can be made with respect to section 4(f)(2) plans in the aggregate. This alternative basis provides greater flexibility than a benefit-by-benefit basis in order to carry out the declared statutory purpose "to help employers and workers find ways of meeting problems arising from the impact of age on employment." A "benefit package" approach is an alternative approach consistent with this purpose and with the general purpose of section 4(f)(2) only if it is not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees. A "benefit package" approach used for either of these purposes would be a subterfuge to evade the purposes of the Act. In order to assure that such a "benefit package" approach is not abused and is consistent with the legislative intent, it is subject to the limitations described in § 860.120(f), which also includes a general example.

(3) *Cost data—Five year maximum basis.* Cost comparisons and adjustments under section 4(f)(2) may be made on the basis of age brackets of up to 5 years. Thus a particular benefit may be reduced for employees of any age within the protected age group by an amount no greater than that which could be justified by the additional cost to provide them with the same level of the benefit as younger employees within a specified five-year age group immediately preceding theirs. For example, where an employer chooses to provide unreduced group term life insurance benefits until age 60, benefits for employees who are between 60 and 65 years of age may be reduced only to the extent necessary to achieve approximate equivalency in costs with employees who are 55 to 60 years old. Similarly, any reductions in benefit levels for 65 to 70 year old employees cannot exceed an amount which is proportional to the additional costs for their coverage over 60 to 65 year old employees.

(4) *Employee contributions in support of employee benefit plans*—(i) *As a condition of employment.* An older employee within the protected age group may not be required as a condition of employment to make greater contributions than a younger employee in support of an employee benefit plan. Such a requirement would be in effect a mandatory reduction in take-home pay, which is never authorized by section 4(f)(2), and would impose an impediment to employment in violation of the specific restrictions in section 4(f)(2).

(ii) *As a condition of participation in a voluntary employee benefit plan.* An older employee within the protected age group may be required as a condition of participation in a voluntary employee benefit plan to make a greater contribution than a younger employee only if the older employee is not thereby required to bear a greater proportion of the total premium cost (employer-paid and employee-paid) than the younger employee. Otherwise the requirement would discriminate against the older employee by making compensation in the form of an employer contribution available on less favorable terms than for the younger employee and denying that compensation altogether to an older employee unwilling or unable to meet the less favorable terms. Such discrimination is not authorized by section 4(f)(2). This principle applies to three different contribution arrangements as follows:

(A) *Employee-pay-all plans.* Older employees, like younger employees, may be required to contribute as a condition of participation up to the full premium cost for their age.

(B) *Non-contributory ("employer-pay-all") plans.* Where younger employees are not required to contribute any portion of the total premium cost, older employees may not be required to contribute any portion.

(C) *Contributory plans.* In these plans employers and participating employees share the premium cost. The required contributions of participants may increase with age so long as the *proportion* of the total premium required to be paid by the participants does not increase with age.

(iii) *As an option in order to receive an unreduced benefit.* An older employee may be given the option, as an individual, to make the additional contribution necessary to receive the same level of benefits as a younger employee (provided that the contemplated reduction in benefits is otherwise justified by section 4(f)(2)).

(5) *Forfeiture clauses.* Clauses in employee benefit plans which state that litigation or participation in any manner in a formal proceeding by an employee will result in the forfeiture of his rights are unlawful insofar as they may be applied to those who seek redress under the Act. This is by reason of section 4(d) which provides that it is unlawful for an employer, employment agency, or labor organization to discriminate against any individual because such individual "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act."

(6) *Refusal to hire clauses.* Any provision of an employee benefit plan which requires or permits the refusal to hire an individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purposes of the Act and cannot be excused under section 4(f)(2).

(7) *Involuntary retirement clauses.* Any provision of an employee benefit plan which requires or permits the involuntary retirement of any individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purpose of the Act and cannot be excused under section 4(f)(2).

(e) *Benefits provided by the Government.* An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

(f) *Application of section 4(f)(2) to various employee benefit plans.* (1) *Benefit-by-benefit approach.* This portion of the interpretation discusses how a benefit-by-benefit approach would apply to four of the most common types of employee benefit plans.

(i) *Life insurance.* It is not uncommon for life insurance coverage to remain constant until a specified age, frequently 65, and then be reduced. This practice will not violate the Act (even if reductions start before age 65), provided that the reduction for an employee of a particular age is no greater than is justified by the increased cost of coverage for that employee's specific age bracket encompassing no more than five years. It should be noted that a total denial of life insurance, on the basis of age, would not be justified under a benefit-by-benefit analysis. However, it is not unlawful for life insurance coverage to cease at age 70 or upon separation from service, whichever occurs first.

(ii) *Health insurance.* Ordinarily, health insurance coverage has not varied significantly with age up to age 65. The great variety of health insurance plans makes it difficult to offer a general guideline as to when, if ever, reductions in coverage might be justified by increased costs. Such reductions may not, however, be concentrated on certain items so as to make coverage less attractive to older workers.

(A) With respect to employees eligible for Medicare, it is not unlawful for an employer to "carve-out" from its own health insurance plan those benefits actually paid for by Medicare. Under such a "carve-out" approach, Medicare assumes primary responsibility for health care expenses under the employer's regular health insurance plan; the regular plan pays only for those expenses it insures against which are not actually paid for by Medicare. It is also not unlawful for an employer to place employees eligible for Medicare in a separate health insurance plan which supplements Medicare, *provided* (*1*) that the cost to the employer for such a supplemental plan is not less than the cost which would be expended to include such individuals in the regular health plan (with a Medicare "carve-out") and (*2*) that the supplemental plan provides benefits which are no less favorable than an employee eligible for Medicare benefits would receive under the employer's regular health insurance plan.

(B) An employer may not assume that eligible employees have taken advantage of available Medicare coverage, unless the employer informs each eligible employee of the need to apply for Medicare coverage and provides any necessary assistance for making an application for benefits. Furthermore, where the employer's regular health plan requires no employee contribution or an employee contribution less than that required for Medicare "Part B" coverage, the employer must pay or contribute toward the "Part B" contribution so as to make the total benefits available on terms which are no less favorable for employees over 65 than for employees under 65. However, the employer's total contribution for "Part B" and the "carve-out" or supplemental plan would not have to be greater than the employer's highest contribution for health benefits for employees of any age under 65.

(C) As a result of the savings to employers when benefits are available through Medicare, reductions in total health benefits for employees age 65 to 70 will generally not be justified. The total denial on the basis of age of employer-provided health benefits for older employees not eligible for Medicare would never be justified. It is not unlawful, however, for health insurance coverage to cease at age 70 or upon separation from service, whichever occurs first.

(iii) *Long-term disability.* It has been common in the past to cut off long-term disability benefits for all disabled employees and long-term disability coverage for all active employees at age 65. Since the Act protects employees and their expectations of employment from discrimination up to age 70, this practice can no longer be justified under a benefit-by-benefit approach. Under such an approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. An employer which provides long-term disability coverage to all employees until the age of 70 may avoid any increases in the cost to it that such coverage for older employees would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:

(A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.

(B) With respect to disabilities which occur after age 60, benefits cease 5 years after disablement or at age 70, whichever occurs first. Cost data may be produced to support other patterns of reduction as well.

(iv) *Retirement plans.* (A) *Participation.* No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 29 U.S.C. 1001, 1003 (a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

(B) *Benefits.* In addition to the requirements as set forth elsewhere in this section, the following special rules apply to benefits provided under a retirement plan.

(*1*) A defined contribution plan may provide for the cessation of employer contributions after the normal retirement age of any participant in the plan. A defined contribution plan may also provide that no employer contributions shall be made on behalf of an employee who is hired after normal retirement age. However, these provisions apply only with respect to plans which are not "supplemental." Any defined contribution plan is deemed "supplemental" with respect to any employee who is a participant in it as well as in a defined benefit plan maintained by the employer. Where an employer has no defined benefit plan but two or more defined contribution plans, all but one of the defined contribution plans are "supplemental" with respect to those employees who are participants in them. The one defined contribution plan which is not "supplemental" could provide for the cessation of employer contributions after normal retirement age. The employer can designate which one of the defined contributions plans is not "supplemental".

(*2*) In a defined contribution plan, investment gains and losses and employee termination forfeitures are typically allocated to individual accounts instead of being used to reduce employer contributions. Where this is done, the allocations shall not be made less favorably on the basis of age to older employees (including those continuing to work past normal retirement age) than to younger employees. This rule shall apply regardless of whether or not the defined contribution plan is "supplemental."

(*3*) A defined benefit plan may fail to credit, for purposes of benefit accrual, service which occurs after an employee's normal retirement age.

(*4*) A defined benefit plan need not adjust actuarially the benefit accrued as of normal retirement age for an employee who continues to work beyond that age. (A defined contribution plan would have to pay the balance in the individual account.)

(*5*) A defined benefit plan need not provide for the accrual of benefits for an employee who continues to work after normal retirement age.

(*6*) A defined benefit plan may provide, and may be amended to provide, that retirement benefits will commence at the actual date of retirement rather than at normal retirement age for employees who choose to work beyond normal retirement age. Employees receiving long-term disability benefits as a salary replacement may be deemed not to have "actually retired" and therefore need not be simultaneously provided with retirement benefits.

(*7*) A defined benefit plan need not take into account salary increases and benefit improvements under the plan which take place after an employee reaches the normal retirement age specified in the plan with respect to those employees continuing their employment beyond that age. However, benefit improvements for retirees may not be denied to such employees who do not receive the advantage of benefit accruals and increases given younger employees.

(*8*) A defined benefit plan which includes offsets for Social Security and which ceases benefit accruals or any other increases at the normal retirement age specified in the plan may not offset the benefit receivable by such employees at actual retirement with the amount of Social Security benefit receivable at that time if that amount is greater than it was at the cessation of accruals. The total retirement benefit must be calculated on the basis of a Social Security benefit no greater than that receivable at the time when benefit accruals ceased under the employer's plan.

(2) *"Benefit Package" Approach.* A "benefit package" approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer *and* no less favorable benefits for employees. As previously noted, in order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it is subject to limitations as set forth below:

(i) *A benefit package approach shall apply only to employee benefit plans which fall within section 4(f)(2).*

(ii) *A benefit package approach shall not apply to a retirement or pension plan.* The 1978 legislative history sets forth specific and comprehensive rules governing such plans, which have been adopted above. These rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans. Variations from these special rules are therefore not justified by variations from the cost-based benefit-by-benefit approach in other benefit plans, nor may variations from the special rules governing pension and retirement plans justify variations from the benefit-by-benefit approach in other benefit plans.

(iii) *A benefit package approach shall not be used to justify reductions in health benefits greater than would be justified under a benefit-by-benefit approach.* Such benefits appear to be of particular importance to older workers in meeting "problems arising from the impact of age" and were of particular concern to Congress. Therefore, the "benefit package" approach may not be used to reduce health insurance benefits by more than is warranted by the increase in the cost to the employer of those benefits alone. Any greater reduction would be a subterfuge to evade the purpose of the Act.

(iv) *A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees.* No employees may be deprived because of age of one benefit without an offsetting benefit being made available to them.

(v) *Employers who wish to justify benefit reductions under a benefit package approach must be prepared to produce data to show that those reductions are fully justified.* Thus employers must be able to show that deviations from a benefit-by-benefit approach do not result in lesser cost to them or less favorable benefits to their employees. A general example consistent with these limitations may be given. Assume two employee benefit plans, providing Benefit "A" and Benefit "B." Both plans fall within section 4(f)(2), and neither is a retirement or pension plan subject to special rules. Both benefits are available to all employees. Age-based cost increases would justify a 10% decrease in both benefits on a benefit-by-benefit basis. The affected employees would, however, find it more favorable—that is, more consistent with meeting their needs—for no reduction to be made in Benefit "A" and a greater reduction to be made in Benefit "B." This "trade-off" would not result in a reduction in health benefits. The "trade-off" may therefore be made. The details of the "trade-off" depend on data on the relative cost to the employer of the two benefits. If the data show that Benefit "A" and Benefit "B" cost the same, Benefit "B" may be reduced up to 20% if Benefit "A" is unreduced. If the data show that Benefit "A" costs only half as much as Benefit "B", however, Benefit "B" may be reduced up to only 15% if Benefit "A" is unreduced, since a greater reduction in Benefit "B" would result in an impermissible reduction in total benefit costs.

(g) *Relation of ADEA to State laws.* The ADEA does not preempt State age discrimination in employment laws. However, the failure of the ADEA to preempt such laws does not affect the issue of whether section 514 of the Employee Retirement Income Security Act (ERISA) preempts State laws which related to employee benefit plans.

[44 FR 30658, May 25, 1979]

SUBCHAPTER D—GARNISHMENT OF EARNINGS

PART 870—RESTRICTION ON GARNISHMENT

Subpart A—General

Sec.
870.1 Purpose and scope.
870.2 Amendments to this part.

Subpart B—Determinations and Interpretations

870.10 Maximum part of aggregate disposable earnings subject to garnishment under section 303(a).
870.11 Exceptions to the restrictions provided by section 303(a) of the CCPA and priorities among garnishments.

Subpart C—Exemption for State-Regulated Garnishments

870.50 General provision.
870.51 Exemption policy.
870.52 Application for exemption of State-regulated garnishments.
870.53 Action upon an application for exemption.
870.54 Standards governing the granting of an application for exemption.
870.55 Terms and conditions of every exemption.
870.56 Termination of exemption.
870.57 Exemptions.

AUTHORITY: Secs. 303, 305, 306, 82 Stat. 163, 164; 15 U.S.C. 1673, 1675, 1676, unless otherwise noted.

SOURCE: 35 FR 8226, May 26, 1970, unless otherwise noted.

Subpart A—General

§ 870.1 Purpose and scope.

(a) This part sets forth the procedures and any policies, determinations, and interpretations of general application whereby the Secretary of Labor carries out his duties under section 303 of the CCPA dealing with restrictions on garnishment of earnings, and section 305 permitting exemptions for State-regulated garnishments in certain situations. While the Secretary's duties under section 303 include insuring that certain amounts of earnings are protected, such duties do not include establishing priorities among multiple garnishments, as such priorities are determined by other Federal statutes or by State law.

(b) Functions of the Secretary under the CCPA to be performed as provided in this part are assigned to the Administrator of the Wage and Hour Division (hereinafter referred to as the Administrator), who, under the general direction and control of the Assistant Secretary, Wage and Labor Standards Administration, shall be empowered to take final and binding actions in administering the provisions of this part. The Administrator is empowered to subdelegate any of his duties under this part. Any legal advice and assistance required for administration of this part shall be provided by the Solicitor of Labor.

[35 FR 8226, May 26, 1970, as amended at 44 FR 30684, May 29, 1979]

§ 870.2 Amendments to this part.

The Administrator may, at any time upon his own motion or upon written request of any interested person setting forth reasonable grounds therefor, amend any rules in this part.

Subpart B—Determinations and Interpretations

§ 870.10 Maximum part of aggregate disposable earnings subject to garnishment under section 303(a).

(a) *Statutory provison.* Section 303 (a) of the CCPA provides that, with some exceptions,

> the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or
>
> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938, in effect at the time the earnings are payable.
>
> whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) *Weekly pay period.* The statutory exemption formula applies directly to the aggregate disposable earnings paid or payable for a pay period of 1 workweek, or a lesser period. Its intent is to protect from garnishment and save to an individual earner, the specified amount of compensation for his personal services rendered in the workweek, or a less period. Thus:

(1) If an individual's disposable earnings for a workweek or lesser period are $79.50 (30×$2.65) or less, his/her earnings may not be garnished in any amount. The amount which may not be garnished is 30 times the Fair Labor Wage Standards Act minimum wage. When the minimum wage increases, this amount will also increase. On January 1, 1979, the minimum wage increases to $2.90, on January 1, 1980, it increases to $3.10; and on January 1, 1981, it increases to $3.35. Accordingly, the amount of disposable weekly earnings which may not be garnished will increase to $87 on January 1, 1979; to $93 on January 1, 1980; and to $100.50 on January 1, 1981.

(2) If an individual's disposable earnings for a workweek or lesser period are more than $79.50, but less than $106, only the amount above $79.50 is subject to garnishment. As the $106 figure is in fact 40 times the Fair Labor Standards Act minimum wage of $2.65, this figure will increase to $116 on January 1, 1979; to $124 on January 1, 1980; and to $134 on January 1, 1981.

(3) If an individual's disposable earnings for a workweek or lesser period are $106 or more, 25 percent of his/her disposable earnings is subject to garnishment. As pointed out in subparagraph (2), of this paragraph, the $106 figure is increased to $116 on January 1, 1979; to $124 on January 1, 1980; and to $134 on January 1, 1981.

(c) *Pay for a period longer than 1 week.* In the case of disposable earnings which compensate for personal services rendered in a pay period longer than 1 workweek, the weekly statutory exemption formula must be transformed to a formula applicable to such earnings providing equivalent restrictions on wage garnishment.

(1) The 25 percent part of the formula would apply to the aggregate disposable earnings for all the workweeks or fractions thereof compensated by the pay for such pay period.

(2) The "multiple" of the Federal minimum hourly wage equivalent to that applicable to the disposable earnings for 1 week is represented by the following formula: The number of workweeks or fractions thereof (×) ×30× the applicable Federal minimum wage ($2.65). For the purpose of this formula, a calendar month is considered to consist of 4⅓ workweeks. Thus, so long as the Federal minimum hourly wage is $2.65 an hour, the "multiple" applicable to the disposable earnings for a 2-week period is $159.00 (2×30×$2.65); for a monthly period, $344.50 (4⅓×30×$2.65). The "multiple" for any other pay period longer than 1 week shall be computed in a manner consistent with section 303(a) of the act and with this paragraph.

(3) Disposable earnings for individuals paid weekly, biweekly, semimonthly, and monthly may not be garnished unless they are in excess of the following amounts:

Date	Minimum amount	Weekly amount	Biweekly amount	Semimonthly amount	Monthly rate
Jan. 1, 1978	$2.65	$79.50	$159.00	$172.25	$344.50
Jan. 1, 1979	2.90	87.00	174.00	188.50	377.00
Jan. 1, 1980	3.10	93.00	186.00	201.50	403.00
Jan. 1, 1981	3.35	100.50	201.00	217.75	435.50

(4) If the disposable earnings are less than the following figures, only the difference between the appropriate figures set forth in paragraph (c)(3) of this section and the appropriate figure of the following figures may be garnished.

BEST DOCUMENT AVAILABLE

Date	Minimum amount	Weekly amount	Biweekly amount	Semi-monthly amount	Monthly rate
Jan. 1, 1978	$2.65	$106.00	$212.00	$229.67	$459.32
Jan. 1, 1979	2.90	116.00	232.00	251.33	502.67
Jan. 1, 1980	3.10	124.00	248.00	268.67	537.33
Jan. 1, 1981	3.35	134.00	268.00	290.33	580.67

For example, in January of 1978, if an individual's disposable earnings for a biweekly pay period are $205, the difference between $159 and $205 (i.e., $46) may be garnished.

(5) If disposable earnings are in excess of the figures stated in paragraph (c)(4) of this section, 25% of the disposable earnings may be garnished.

(d) *Date wages paid or payable controlling.* The date that disposable earnings are paid or payable, and not the date the Court issues the garnishment order, is controlling in determining the amount of disposable earnings that may be garnished. Thus, a garnishment order issued in November 1977, providing for withholding from wages over a period of time, based on exemptions computed at the $2.30 per hour minimum wage then in effect, would be modified by operation of the change in the law so that wages paid after January 1, 1978, would be subject to garnishment during 1978 only to the extent described in paragraphs (b) and (c) of this section on the basis of a minimum rate of $2.65 per hour. This principle is applicable at the time of each further increase in the minimum wage, i.e., January 1, of the years 1979, 1980, and 1981.

(Sec. 2, Pub. L. 93-259, 84 Stat 55)

[35 FR 8226, May 26, 1970, as amended at 40 FR 52610, Nov. 11, 1975; 43 FR 28471, June 30, 1978; 43 FR 30276, July 14, 1978; 44 FR 30685, May 29, 1979]

§ 870.11 Exceptions to the restrictions provided by section 303(a) of the CCPA and priorities among garnishments.

(a) (1) Section 303(b) of the Consumer Credit Protection Act provides that the restrictions in section 303(a) do not apply to:

(i) Any debt due for any State or Federal tax, or

(ii) Any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act.

(2) Accordingly the Consumer Credit Protection Act does not restrict in any way the amount which may be withheld for State or Federal taxes or in Chapter XIII Bankruptcy Act proceedings.

(b) (1) Section 303(b) provides the following restrictions on the amount that may be withheld for the support of any person (e.g. alimony or child support):

> "(A) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is issued), 50 per centum of such individual's disposable earnings for that week; and
>
> "(B) Where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week; except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve week period which ends with the beginning of such workweek."

(2) Compliance with the provisions of section 303(a) and (b) may offer problems when there is more than one garnishment. In that event the priority is determined by State law or other Federal laws as the CCPA contains no provisions controlling the priorities of garnishments. However, in no event may the amount of any individual's disposable earnings which may be garnished exceed the percentages specified in section 303. To illustrate:

(i) If 45% of an individual's disposable earnings were garnished for taxes, and this garnishment has priority, the Consumer Credit Protection Act permits garnishment for the support of any person of only the differ-

BEST DOCUMENT AVAILABLE

ence between 45% and the applicable percentage (50 to 65%) in the above quoted section 303(b).

(ii) If 70% of an individual's disposable earnings were garnished for taxes and/or a Title XIII Bankruptcy debt, and these garnishments have priority, the Consumer Credit Protection Act does not permit garnishment either for the support of any person or for other debts.

(iii) If 25% of an individual's disposable earnings were withheld pursuant to an ordinary garnishment which is subject to the restrictions of section 303(a), and the garnishment has priority in accordance with State law, the Consumer Credit Protection Act permits the additional garnishment for the support of any person of only the difference between 25% and the applicable percentage (50-65%) in the above quoted section 303(b).

(iv) If 25% or more of an individual's disposable earnings were withheld pursuant to a garnishment for support, and the support garnishment has priority in accordance with State law, the Consumer Credit Protection Act does not permit the withholding of any additional amounts pursuant to an ordinary garnishment which is subject to the restrictions of section 303(a).

[44 FR 30685, May 29, 1979]

Subpart C—Exemption for State-Regulated Garnishments

§ 870.50 General provision.

Section 305 of the CCPA authorizes that Secretary to "exempt from the provisions of section 303(a) garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 303(a)."

§ 870.51 Exemption policy.

(a) It is the policy of the Secretary of Labor to permit exemption from section 303(a) of the CCPA garnishments issued under the laws of a State if those laws considered together cover every case of garnishment covered by the Act, and if those laws provide the same or greater protection to individuals. Differences in text between the restrictions of State laws and those in section 303(a) of the Act are not material so long as the State laws provide the same or greater restrictions on the garnishment of individuals' earnings.

(b) In determining whether State-regulated garnishments should be exempted from section 303(a) of the CCPA, or whether such an exemption should be terminated, the laws of the State shall be examined with particular regard to the classes of persons and of transactions to which they may apply; the formulas provided for determining the maximum part of an individual's earnings which may be subject to garnishment; restrictions on the application of the formulas; and with regard to procedural burdens placed on the individual whose earnings are subject to garnishment.

(c) Particular attention is directed to the fact that subsection (a) of section 303, when considered with subsection (c) of that section, is read as not requiring the raising of the subsection (a) restrictions as affirmative defenses in garnishment proceedings.

§ 870.52 Application for exemption of State-regulated garnishments.

(a) An application for the exemption of garnishments issued under the laws of a State may be made in duplicate by a duly authorized representative of the State. The application shall be filed with the Administrator of the Wage and Hour Division, Department of Labor, Washington, D.C. 20210.

(b) Any application for exemption must be accompanied by two copies of all the provisions of the State laws relating to the garnishment of earnings, certified to be true and complete copies by the Attorney General of the State. In addition, the application must be accompanied by a statement, in duplicate, signed by the Attorney General of the State, showing how the laws of the State satisfy the policy expressed in § 870.51(a) and setting forth any other matters which the Attorney General may wish to state concerning the application.

(c) Notice of the filing of an application for exemption shall be published in the Federal Register. Copies of the application shall be available for public inspection and copying during business hours at the national office of the Wage and Hour Division and in the regional office of the Wage and Hour Divison in which the particular State is located. Interested persons shall be afforded an opportunity to submit written comments concerning the application of the State within a period of time to be specified in the notice.

[35 FR 8226, May 26, 1970, as amended at 35 FR 14315, Sept. 11, 1970]

§ 870.53 Action upon an application for exemption.

(a) The Administrator shall grant or deny within a reasonable time any application for the exemption of State-regulated garnishments. The State representative shall be notified in writing of the decision. In the event of denial, a statement of the grounds for the denial shall be made. To the extent feasible and appropriate, the Administrator may afford to the State representative and to any other interested persons an opportunity to submit orally or in writing data, views, and arguments on the issue of whether or not an exemption should be granted and on any subsidiary issues.

(b) If an application is denied, the State representative shall have an opportunity to request reconsideration by the Administrator. The request shall be made in writting. The Administrator shall permit argument whenever the opportunity to do so has not been afforded under paragraph (a) of this section, and may permit argument in any other case.

(c) General notice of every exemption of State-regulated garnishments and of its terms and conditions shall be given by publication in the Federal Register.

§ 870.54 Standards governing the granting of an application for exemption.

The Administrator may grant any application for the exemption of State-regulated garnishments whenever he finds that the laws of the State satisfy the policy expressed in § 870.51(a).

§ 870.55 Terms and conditions of every exemption.

(a) It shall be a condition of every exemption of State-regulated garnishments that the State representative have the powers and duties (1) to represent, and act on behalf of, the State in relation to the Administrator and his representatives, with regard to any matter relating to, or arising out of, the application, interpretation, and enforcement of State laws regulating garnishment of earnings; (2) to submit to the Administrator in duplicate and on a current basis, a certified copy of every enactment by the State legislature affecting any of those laws, and a certified copy of any decision in any case involving any of those laws, made by the highest court of the State which has jurisdiction to decide or review cases of its kind, if properly presented to the court; and (3) to submit to the Administrator any information relating to the enforcement of those laws, which the Administrator may request.

(b) The Administrator may make any exemption subject to additional terms and conditions which he may find appropriate to carry out the purposes of section 303(a) of the Act.

§ 870.56 Termination of exemption.

(a) After notice and opportunity to be heard, the Administrator shall terminate any exemption of State-regulated garnishments when he finds that the laws of the State no longer satisfy the purpose of section 303(a) of the Act or the policy expressed in § 870.51(a). Also, after notice and opportunity to be heard, the Administrator may terminate any exemption if he finds that any of its terms or conditions have been violated.

(b) General notice of the termination of evey exemption of State-regulated garnishments shall be given by publication in the Federal Register.

§ 870.57 Exemptions.

Pursuant to section 305 of the CCPA (82 Stat. 164) and in accordance with the provisions of this part, it has been determined that the laws of the following States provide restrictions on garnishment which are substantially similar to those provided in section 303(a) of the CCPA (82 Stat. 163); and that, therefore, garnishments issued under those laws should be, and they hereby are, exempted from the provisions of section 303(a) subject to the terms and conditions of §§ 870.55(a) and 870.56:

(a) *State of Virginia.* Effective June 30, 1978, garnishments issued under the laws of the State of Virginia are exempt from the provisions of sections 303(a) and 303(b) of the CCPA under the following additional conditions: (1) Whenever garnishments are ordered in the State of Virginia which are not deemed to be governed by section 34-29 of the Code of Virginia, as amended, and the laws of another State are applied, sections 303(a) and 303(b) of the CCPA shall apply to such garnishments according to the provisions thereof; and (2) whenever the earnings of any individual subject to garnishment are withheld and a suspending or supersedeas bond is undertaken in the course of an appeal from a lower court decision, sections 303(a) and 303(b) of the CCPA shall apply to the withholding of such earnings under this procedure according to the provisions thereof.

[35 FR 18527, Dec. 5, 1970, as amended at 43 FR 28472, June 30, 1978]

PARTS 871-899—[RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Material Approved for Incorporation by Reference
Table of CFR Titles and Chapters
Alphabetical List of Agencies appearing in the CFR
Redesignation Tables
List of CFR Sections Affected

BLANK PAGE

BLANK PAGE

Material Approved for Incorporation by Reference

The Director of the Federal Register approves the following incorporations by reference effective July 1, 1982, unless otherwise noted (5 U.S.C. 552(a) and 1 CFR Part 51). For more information on incorporation by reference, see the preliminary pages of this volume.

29 CFR CHAPTER V (PARTS 500 TO 899)
WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

	29 CFR
Department of Agriculture, Agricultural Marketing Service (for the Bureau of Agricultural Economics of the U.S. Department of Agriculture)	
U.S. Government Printing Office, (GPO) Bookstores located throughout the United States.	
Tobacco in the United States—U.S. Department of Agriculture—Agricultural Marketing Service, Miscellaneous Publication No. 867—See page 2, Revised Feb., 1979.	526.10
Institute of Makers of Explosives	
420 Lexington Ave., New York, NY 10017	
The American Table of Distances, June 5, 1964	570.51
Michigan State University	
Department of Secondary Education, East Lansing, MI	
Vocational Agriculture Training Programs: Safe Tractor Operation, Safe Farm Machinery Operation (Rural Manpower Center, Special Paper No. 8, Ap., 1969).	570.72
National Education Association	
1201 16th St., N.W., Washington, D.C. 20036	
Standards for School Buses, 1964 Rev. ed.	570.52
National 4-H Council	
7100 Connecticut Ave., Washington, D.C. 20015	
Petroleum Power Program: Specified Units from four Training Manuals on operation and use of tractors.	570.72
The Interstate Printers & Publishers	
Danville, IL	
Agricultural Engineering, 1965 ed	570.71
Department of Commerce	
National Bureau of Standards, Gaithersburg, MD 20234	
Maximum Permissible Body Burdens and Maximum Permissible Concentrations of Radionuclides in Air and in Water for Occupational Exposure (National Bureau of Standards, Handbook 69, 1959).	570.57

BEST DOCUMENT AVAILABLE

BLANK PAGE

BLANK PAGE

Table of CFR Titles and Chapters

(As of June 18, 1982)

Title 1—General Provisions

Chap.	
I	Administrative Committee of the Federal Register (Parts 1-49)
II	Office of the Federal Register (Parts 50-299)
III	Administrative Conference of the United States (Parts 300-399)
IV	Miscellaneous Agencies (Parts 400-499)

Title 2—[Reserved]

Title 3—The President

	Proclamations
	Executive Orders
	Presidential Documents Other Than Proclamations and Executive Orders
I	Executive Office of the President (Parts 100-199)

Title 4—Accounts

I	General Accounting Office (Parts 1-99)
II	Federal Claims Collection Standards (General Accounting Office—Department of Justice) (Parts 100-299)
III	General Accounting Office (CASB) (Parts 300-499)

Title 5—Administrative Personnel

I	Office of Personnel Management (Parts 1-1199)
II	Merit Systems Protection Board (Parts 1200-1299)
III	Office of Management and Budget (Parts 1300-1399)
IV	Advisory Committee on Federal Pay (Parts 1400-1499)
V	The International Organizations Employees Loyalty Board (Parts 1500-1599)
VII	Advisory Commission on Intergovernmental Relations (Parts 1700-1799)
IX	Appalachian Regional Commission (Parts 1900-1999)
XI	United States Soldiers' and Airmen's Home (Parts 2100-2199)
XIV	Federal Labor Relations Authority and Federal Service Impasses Panel (Parts 2400-2499)

Title 5—Administrative Personnel—Continued

Chap.	
XV	Office of Administration, Executive Office of the President (Parts 2500-2599)

Title 6—[Reserved]

Title 7—Agriculture

	SUBTITLE A—Office of the Secretary of Agriculture (Parts 0-25a)
	SUBTITLE B—Regulations of the Department of Agriculture
I	Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture (Parts 26-209)
II	Food and Nutrition Service, Department of Agriculture (Parts 210-299)
III	Animal and Plant Health Inspection Service, Department of Agriculture (Parts 300-399)
IV	Federal Crop Insurance Corporation, Department of Agriculture (Parts 400-499)
V	Agricultural Research Service, Department of Agriculture (Parts 500-599)
VI	Soil Conservation Service, Department of Agriculture (Parts 600-699)
VII	Agricultural Stabilization and Conservation Service (Agricultural Adjustment), Department of Agriculture (Parts 700-799)
VIII	Federal Grain Inspection Service, Department of Agriculture (Parts 800-899)
IX	Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Nuts), Department of Agriculture (Parts 900-999)
X	Agricultural Marketing Service (Marketing Agreements and Orders; Milk), Department of Agriculture (Parts 1000-1199)
XI	Agricultural Marketing Service (Marketing Agreements and Orders; Miscellaneous Commodities), Department of Agriculture (Parts 1200-1299)
XII	Statistical Reporting Service (Agricultural Statistics), Department of Agriculture (Parts 1300-1399) [Reserved]
XIV	Commodity Credit Corporation, Department of Agriculture (Parts 1400-1499)
XV	Foreign Agricultural Service, Department of Agriculture (Parts 1500-1599)
XVI	Rural Telephone Bank, Department of Agriculture (Parts 1600-1699)
XVII	Rural Electrification Administration, Department of Agriculture (Parts 1700-1799)
XVIII	Farmers Home Administration, Department of Agriculture (Parts 1800-2099)
XXI	Foreign Economic Development Service, Department of Agriculture (Parts 2100-2199)
XXIV	Board of Contract Appeals, Department of Agriculture (Parts 2400-2499)

Title 7—Agriculture—Continued

Chap.	
XXV	Office of the General Sales Manager, Department of Agriculture (Parts 2500-2599)
XXVI	Office of the Inspector General, Department of Agriculture (Parts 2600-2699)
XXIX	Office of Energy, Department of Agriculture (Parts 2900-2999)
XXX	Office of Operations and Finance, Department of Agriculture (Parts 3000-3099)
XXXI	Office of Environmental Quality, Department of Agriculture (Parts 3100-3199)

Title 8—Aliens and Nationality

I	Immigration and Naturalization Service, Department of Justice (Parts 1-499)

Title 9—Animals and Animal Products

I	Animal and Plant Health Inspection Service, Department of Agriculture (Parts 1-199)
II	Packers and Stockyards Administration, Department of Agriculture (Parts 200-299)
III	Food Safety and Inspection Service, Meat and Poultry Inspection, Department of Agriculture (Parts 300-399)

Title 10—Energy

I	Nuclear Regulatory Commission (Parts 0-199)
II	Department of Energy (Parts 200-699)
III	Department of Energy (Parts 700-999)
X	Department of Energy (General Provisions) (Parts 1000-1099)
XV	Office of the Federal Inspector for the Alaska Natural Gas Transportation System (Parts 1500-1599)

Title 11—Federal Elections

I	Federal Election Commission (Parts 1-9099)

Title 12—Banks and Banking

I	Comptroller of the Currency, Department of the Treasury (Parts 1-199)
II	Federal Reserve System (Parts 200-299)
III	Federal Deposit Insurance Corporation (Parts 300-399)
IV	Export-Import Bank of the United States (Parts 400-499)
V	Federal Home Loan Bank Board (Parts 500-599)
VI	Farm Credit Administration (Parts 600-699)
VII	National Credit Union Administration (Parts 700-799)
VIII	Federal Financing Bank (Parts 800-899)
XI	Federal Financial Institutions Examination Council (Parts 1100-1199)

Title 12—Banks and Banking—Continued

Chap.	
XII	Depository Institutions Deregulation Committee (Parts 1200-1299)

Title 13—Business Credit and Assistance

I	Small Business Administration (Parts 1-199)
III	Economic Development Administration, Department of Commerce (Parts 300-399)
IV	Chrysler Corporation Loan Guarantee Board (Parts 400-499)
V	Regional Action Planning Commissions (Parts 500-599)

Title 14—Aeronautics and Space

I	Federal Aviation Administration, Department of Transportation (Parts 1-199)
II	Civil Aeronautics Board (Parts 200-399)
V	National Aeronautics and Space Administration (Parts 1200-1299)

Title 15—Commerce and Foreign Trade

	SUBTITLE A—Office of the Secretary of Commerce (Parts 0-19)
	SUBTITLE B—Regulations Relating to Commerce and Foreign Trade
I	Bureau of the Census, Department of Commerce (Parts 20-199)
II	National Bureau of Standards, Department of Commerce (Parts 200-299)
III	International Trade Administration, Department of Commerce (Parts 300-399)
IV	Foreign-Trade Zones Board (Parts 400-499)
V	United States Metric Board (Parts 500-599)
VI	Bureau of Industrial Economics, Department of Commerce (Parts 600-699)
VIII	Bureau of Economic Analysis, Department of Commerce (Parts 800-899)
IX	National Oceanic and Atmospheric Administration, Department of Commerce (Parts 900-999)
XII	United States Travel Service, Department of Commerce (Parts 1200-1299)
XIII	East-West Foreign Trade Board (Parts 1300-1999)
	SUBTITLE C—Regulations Relating to Foreign Trade Agreements
XX	Office of the United States Trade Representative (Parts 2000-2099)
	SUBTITLE D—Regulations Relating to Telecommunications and Information
XXIII	National Telecommunications and Information Administration, Department of Commerce (Parts 2300-2399)

Title 16—Commercial Practices

Chap.	
I	Federal Trade Commission (Parts 0-999)
II	Consumer Product Safety Commission (Parts 1000-1799)

Title 17—Commodity and Securities Exchanges

I	Commodity Futures Trading Commission (Parts 1-199)
II	Securities and Exchange Commission (Parts 200-399)

Title 18—Conservation of Power and Water Resources

I	Federal Energy Regulatory Commission, Department of Energy (Parts 1-399)
III	Delaware River Basin Commission (Parts 400-499)
IV	Office of Water Resources Research, Department of the Interior (Parts 500-599)
VI	Water Resources Council (Parts 700-799)
VIII	Susquehanna River Basin Commission (Parts 800-899)
XIII	Tennessee Valley Authority (Parts 1300-1399)

Title 19—Customs Duties

I	United States Customs Service, Department of the Treasury (Parts 1-199)
II	United States International Trade Commission (Parts 200-299)
III	International Trade Administration, Department of Commerce (Parts 300-399)

Title 20—Employees' Benefits

I	Office of Workers' Compensation Programs, Department of Labor (Parts 1-199)
II	Railroad Retirement Board (Parts 200-399)
III	Social Security Administration, Department of Health and Human Services (Parts 400-499)
IV	Employees' Compensation Appeals Board, Department of Labor (Parts 500-599)
V	Employment and Training Administration, Department of Labor (Parts 600-699)
VI	Employment Standards Administration, Department of Labor (Parts 700-799)
VII	Benefits Review Board, Department of Labor (Parts 800-899)
VIII	Joint Board for the Enrollment of Actuaries (Parts 900-999)

Title 21—Food and Drugs

I	Food and Drug Administration, Department of Health and Human Services (Parts 1-1299)
II	Drug Enforcement Administration, Department of Justice (Parts 1300-1399)

Title 22—Foreign Relations

Chap.	
I	Department of State (Parts 1-199)
II	Agency for International Development, International Development Cooperation Agency (Parts 200-299)
III	Peace Corps (Parts 300-399)
IV	International Joint Commission, United States and Canada (Parts 400-499)
V	International Communication Agency (Parts 500-599)
VI	United States Arms Control and Disarmament Agency (Parts 600-699)
VII	Overseas Private Investment Corporation (Parts 700-799)
VIII	Employee-Management Relations Commission (Parts 800-899)
IX	Foreign Service Grievance Board (Parts 900-999)
X	Inter-American Foundation (Parts 1000-1099)
XI	International Boundary and Water Commission, United States and Mexico, United States Section (Parts 1100-1199)
XII	United States International Development Cooperation Agency (Parts 1200-1299)
XIII	Board for International Broadcasting (Parts 1300-1399)
XIV	Foreign Service Labor Relations Board; Federal Labor Relations Authority; General Counsel of the Federal Labor Relations Authority; and the Foreign Service Impasse Disputes Panel (Parts 1400-1499)

Title 23—Highways

I	Federal Highway Administration, Department of Transportation (Parts 1-999)
II	National Highway Traffic Safety Administration and Federal Highway Administration, Department of Transportation (Parts 1200-1299)

Title 24—Housing and Urban Development

	SUBTITLE A—Office of the Secretary, Department of Housing and Urban Development (Parts 0-99)
	SUBTITLE B—Regulations Relating to Housing and Urban Development
I	Office of Assistant Secretary for Equal Opportunity, Department of Housing and Urban Development (Parts 100-199)
II	Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 200-299)
III	Government National Mortgage Association, Department of Housing and Urban Development (Parts 300-399)
IV	Office of Assistant Secretary for Housing Management, Department of Housing and Urban Development (Parts 400-499)
V	Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 500-599)

Title 24—Housing and Urban Development—Continued

Chap.	
VI	Office of Assistant Secretary for Community Planning and Development, Department of Housing and Urban Development (Parts 600-699)
VII	New Community Development Corporation, Department of Housing and Urban Development (Parts 700-799)
VIII	Low-Income Housing, Department of Housing and Urban Development (Parts 800-899)
IX	Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 1700-1799)
X	Solar Energy and Energy Conservation Bank, Department of Housing and Urban Development (Parts 1800-1899)
XV	Mortgage Insurance and Loan Programs Under the Emergency Homeowners' Relief Act, Department of Housing and Urban Development (Parts 2700-2799)
XX	Office of Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (Parts 3200-3699)
XXV	Neighborhood Reinvestment Corporation (Parts 4100-4199)

Title 25—Indians

I	Bureau of Indian Affairs, Department of the Interior (Parts 1-299)
II	Indian Arts and Crafts Board, Department of the Interior (Parts 300-399)
IV	Navajo and Hopi Indian Relocation Commission (Parts 700-799)

Title 26—Internal Revenue

I	Internal Revenue Service, Department of the Treasury (Parts 1-699)

Title 27—Alcohol, Tobacco Products and Firearms

I	Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury (Parts 1-299)

Title 28—Judicial Administration

I	Department of Justice (Parts 0-199)
III	Federal Prison Industries, Department of Justice (Parts 300-399)
V	Bureau of Prisons, Department of Justice (Parts 500-599)

Title 29—Labor

	SUBTITLE A—Office of the Secretary of Labor (Parts 0-99)
	SUBTITLE B—Regulations Relating to Labor
I	National Labor Relations Board (Parts 100-199)

Title 29—Labor—Continued

Chap.	
II	Office of the Assistant Secretary for Labor-Management Relations, Department of Labor (Parts 200-299)
III	National Railroad Adjustment Board (Parts 300-399)
IV	Office of Labor-Management Standards Enforcement, Department of Labor (Parts 400-499)
V	Wage and Hour Division, Department of Labor (Parts 500-899)
IX	Construction Industry Collective Bargaining Commission (Parts 900-999)
X	National Mediation Board (Parts 1200-1299)
XII	Federal Mediation and Conciliation Service (Parts 1400-1499)
XIV	Equal Employment Opportunity Commission (Parts 1600-1699)
XVII	Occupational Safety and Health Administration, Department of Labor (Parts 1900-1999)
XX	Occupational Safety and Health Review Commission (Parts 2200-2499)
XXV	Pension and Welfare Benefit Programs, Department of Labor (Parts 2500-2599)
XXVI	Pension Benefit Guaranty Corporation (Parts 2600-2699)
XXVII	Federal Mine Safety and Health Review Commission (Parts 2700-2799)

Title 30—Mineral Resources

I	Mine Safety and Health Administration, Department of Labor (Parts 1-199)
II	Geological Survey, Department of the Interior (Parts 200-299)
III	Board of Surface Mining and Reclamation Appeals, Department of the Interior (Parts 300-399)
VI	Bureau of Mines, Department of the Interior (Parts 600-699)
VII	Office of Surface Mining Reclamation and Enforcement, Department of the Interior (Parts 700-999)

Title 31—Money and Finance: Treasury

	SUBTITLE A—Office of the Secretary of the Treasury (Parts 0-50)
	SUBTITLE B—Regulations Relating to Money and Finance
I	Monetary Offices, Department of the Treasury (Parts 51-199)
II	Fiscal Service, Department of the Treasury (Parts 200-399)
IV	Secret Service, Department of the Treasury (Parts 400-499)
V	Office of Foreign Assets Control, Department of the Treasury (Parts 500-599)
VI	Bureau of Engraving and Printing, Department of the Treasury (Parts 600-699)
VII	Federal Law Enforcement Training Center, Department of the Treasury (Parts 700-799)

Title 32—National Defense

Chap.	
	SUBTITLE A—Department of Defense
I	Office of the Secretary of Defense (Parts 1-499)
V	Department of the Army (Parts 500-699)
VI	Department of the Navy (Parts 700-799)
VII	Department of the Air Force (Parts 800-1099)
	SUBTITLE B—Other Regulations Relating to National Defense
XII	Defense Logistics Agency (Parts 1200-1299)
XVI	Selective Service System (Parts 1600-1699)
XIX	Central Intelligence Agency (Parts 1900-1999)
XX	Information Security Oversight Office (Parts 2000-2099)
XXI	National Security Council (Parts 2100-2199)
XXIV	Office of Science and Technology Policy (Parts 2400-2499)
XXVII	Office for Micronesian Status Negotiations (Parts 2700-2799)
XXVIII	Office of the Vice President of the United States (Parts 2800-2899)

Title 33—Navigation and Navigable Waters

I	Coast Guard, Department of Transportation (Parts 1-199)
II	Corps of Engineers, Department of the Army (Parts 200-399)
IV	Saint Lawrence Seaway Development Corporation, Department of Transportation (Parts 400-499)

Title 34—Education

	SUBTITLE A—Office of the Secretary, Department of Education (Parts 1-99)
	SUBTITLE B—Regulations of the Offices of the Department of Education
I	Office for Civil Rights, Department of Education (Parts 100-199)
II	Office of Elementary and Secondary Education, Department of Education (Parts 200-299)
III	Office of Special Education and Rehabilitative Services, Department of Education (Parts 300-399)
IV	Office of Vocational and Adult Education, Department of Education (Parts 400-499)
V	Office of Bilingual Education and Minority Languages Affairs, Department of Education (Parts 500-599)
VI	Office of Postsecondary Education, Department of Education (Parts 600-699)
VII	Office of Educational Research and Improvement, Department of Education (Parts 700-799)
VIII	Office of Education for Overseas Dependents, Department of Education (Parts 800-899) [Reserved]

Title 35—Panama Canal

Chap.	
I	Panama Canal Regulations (Parts 1-299)

Title 36—Parks, Forests, and Public Property

I	National Park Service, Department of the Interior (Parts 1-199)
II	Forest Service, Department of Agriculture (Parts 200-299)
III	Corps of Engineers, Department of the Army (Parts 300-399)
IV	American Battle Monuments Commission (Parts 400-499)
V	Smithsonian Institution (Parts 500-599)
VII	Library of Congress (Parts 700-799)
VIII	Advisory Council on Historic Preservation (Parts 800-899)
IX	Pennsylvania Avenue Development Corporation (Parts 900-999)
X	Commission of Fine Arts (Parts 1000-1099)
XI	Architectural and Transportation Barriers Compliance Board (Parts 1100-1199)

Title 37—Patents, Trademarks, and Copyrights

I	Patent and Trademark Office, Department of Commerce (Parts 1-199)
II	Copyright Office, Library of Congress (Parts 200-299)
III	Copyright Royalty Tribunal (Parts 300-399)

Title 38—Pensions, Bonuses, and Veterans' Relief

I	Veterans Administration (Parts 0-99)

Title 39—Postal Service

I	United States Postal Service (Parts 1-999)
III	Postal Rate Commission (Parts 3000-3099)

Title 40—Protection of Environment

I	Environmental Protection Agency (Parts 1-799)
IV	Low-Emission Vehicle Certification Board (Parts 1400-1499)
V	Council on Environmental Quality (Parts 1500-1599)

Title 41—Public Contracts and Property Management

	SUBTITLE A—Federal Procurement Regulations System
1	Federal Procurement Regulations (Parts 1-1—1-99)
3	Department of Health and Human Services (Parts 3-1—3-99)
4	Department of Agriculture (Parts 4-1—4-99)
5	General Services Administration (Part 5-1—5-99)
5A	Office of Acquisition Policy, General Services Administration (Parts 5A-1—5A-99)
5B	Office of Acquisition Policy, General Services Administration (Parts 5B-1—5B-99)

Chap.	
6	Department of State (Parts 6-1—6-99)
7	Agency for International Development, International Development Cooperation Agency (Parts 7-1—7-99)
8	Veterans Administration (Parts 8-1—8-99)
9	Department of Energy (Parts 9-1—9-99)
10	Department of the Treasury (Parts 10-1—10-99)
12	Department of Transportation (Parts 12-1—12-99)
13	Department of Commerce (Parts 13-1—13-99)
14	Department of the Interior (Parts 14-1—14-99)
14H	Bureau of Indian Affairs, Department of the Interior (Parts 14H-1—14H-99)
14R	Office of Water Research and Technology, Department of the Interior (Parts 14R-1—14R-99)
15	Environmental Protection Agency (Parts 15-1—15-99)
16	Office of Personnel Management (Parts 16-1—16-26)
18	National Aeronautics and Space Administration (Parts 18-1—18-99)
19	International Communication Agency (Parts 19-1—19-99)
20	Nuclear Regulatory Commission (Parts 20-1—20-99)
22	Community Services Administration (Parts 22-1—22-99)
23	United States Arms Control and Disarmament Agency (Parts 23-1—23-99)
24	Department of Housing and Urban Development (Parts 24-1—24-99)
25	National Science Foundation (Parts 25-1—25-99)
28	Department of Justice (Parts 28-1—28-99)
29	Department of Labor (Parts 29-1—29-99)
34	Department of Education (Parts 34-1—34-99)
44	Federal Emergency Management Agency (Parts 44-1—44-99)
	SUBTITLE B—Other Provisions Relating to Public Contracts
50	Public Contracts, Department of Labor (Parts 50-1—50-999)
51	Committee for Purchase from the Blind and Other Severely Handicapped (Parts 51-1—51-99)
60	Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Parts 60-1—60-99)
	SUBTITLE C—Federal Property Management Regulations System
101	Federal Property Management Regulations (Parts 101-1—101-99)
105	General Services Administration (Parts 105-1—105-999)
109	Department of Energy, Property Management Regulations (Parts 109-1—109-99)
114	Department of the Interior (Parts 114-1—114-99)
115	Environmental Protection Agency (Parts 115-1—115-99)
128	Department of Justice (Parts 128-1—128-99)

Title 41—Public Contracts and Property Management—Continued

	SUBTITLE D—Other Provisions Relating to Property Management [Reserved]

Title 42—Public Health

Chap.	
I	Public Health Service, Department of Health and Human Services (Parts 1-199)
III	Saint Elizabeths Hospital, Department of Health and Human Services (Parts 300-399)
IV	Health Care Financing Administration, Department of Health and Human Services (Parts 400-499)

Title 43—Public Lands: Interior

	SUBTITLE A—Office of the Secretary of the Interior (Parts 1-199)
	SUBTITLE B—Regulations Relating to Public Lands
I	Bureau of Reclamation, Department of the Interior (Parts 200-499)
II	Bureau of Land Management, Department of the Interior (Parts 1000-9999)

Title 44—Emergency Management and Assistance

I	Federal Emergency Management Agency (Parts 0-399)
IV	Department of Commerce and Department of Transportation (Parts 400-499)

Title 45—Public Welfare

	SUBTITLE A—Department of Health and Human Services, General Administration (Parts 1-199)
	SUBTITLE B—Regulations Relating to Public Welfare
II	Office of Family Assistance (Assistance Programs), Department of Health and Human Services (Parts 200-299)
III	Office of Child Support Enforcement (Child Support Enforcement Program), Department of Health and Human Services (Parts 300-399)
IV	Office of Refugee Resettlement, Social Security Administration, Department of Health and Human Services (Parts 400-499)
V	Foreign Claims Settlement Commission of the United States, Department of Justice (Parts 500-599)
VI	National Science Foundation (Parts 600-699)
VII	Commission on Civil Rights (Parts 700-799)
VIII	Office of Personnel Management (Parts 800-899)
X	Community Services Administration (Parts 1000-1099)
XI	National Foundation on the Arts and the Humanities (Parts 1100-1199)
XII	ACTION (Parts 1200-1299)

Title 45—Public Welfare—Continued

Chap.	
XIII	Office of Human Development Services, Department of Health and Human Services (Parts 1300-1399)
XVI	Legal Services Corporation (Parts 1600-1699)
XVII	National Commission on Libraries and Information Science (Parts 1700-1799)
XVIII	Harry S Truman Scholarship Foundation (Parts 1800-1899)
XIX	National Commission on the Observance of International Women's Year (Parts 1900-1999)
XXI	Commission of Fine Arts (Parts 2100-2199)

Title 46—Shipping

I	Coast Guard, Department of Transportation (Parts 1-199)
II	Maritime Administration, Department of Transportation (Parts 200-399)
III	Coast Guard (Great Lakes Pilotage), Department of Transportation (Parts 400-499)
IV	Federal Maritime Commission (Parts 500-599)

Title 47—Telecommunication

I	Federal Communications Commission (Parts 0-199)
II	Office of Science and Technology Policy and National Security Council (Parts 200-299)

Title 48—[Reserved]

Title 49—Transportation

	SUBTITLE A—Office of the Secretary of Transportation (Parts 1-99)
	SUBTITLE B—Other Regulations Relating to Transportation
I	Research and Special Programs Administration, Department of Transportation (Parts 100-199)
II	Federal Railroad Administration, Department of Transportation (Parts 200-299)
III	Federal Highway Administration, Department of Transportation (Parts 300-399)
IV	Coast Guard, Department of Transportation (Parts 400-499)
V	National Highway Traffic Safety Administration, Department of Transportation (Parts 500-599)
VI	Urban Mass Transportation Administration, Department of Transportation (Parts 600-699)
VII	National Railroad Passenger Corporation (AMTRAK) (Parts 700-799)
VIII	National Transportation Safety Board (Parts 800-899)
IX	United States Railway Association (Parts 900-999)
X	Interstate Commerce Commission (Parts 1000-1399)

Title 50—Wildlife and Fisheries

Chap.	
I	United States Fish and Wildlife Service, Department of the Interior (Parts 1-199)
II	National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 200-299)
III	International Regulatory Agencies (Fishing and Whaling) (Parts 300-399)
IV	Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations (Parts 400-499)
V	Marine Mammal Commission (Parts 500-599)
VI	Fishery Conservation and Management, National Oceanic and Atmospheric Administration, Department of Commerce (Parts 600-699)

CFR Index and Finding Aids

Subject/Agency Index

List of CFR Titles, Chapters, Subchapters, and Parts

Parallel Tables of Statutory Authorities and Rules

Acts Requiring Publication in the Federal Register

Alphabetical List of Agencies Appearing in the CFR

(As of June 18, 1982)

Agency	CFR Title, Subtitle or Chapter
ACTION	45, XII
Acquisition Policy, Office of	41, 5A, 5B
Administrative Committee of the Federal Register	1, I
Administrative Conference of the United States	1, III
Advisory Commission on Intergovernmental Relations	5, VII
Advisory Committee on Federal Pay	5, IV
Advisory Council on Historic Preservation	36, VIII
Agency for International Development	22, II; 41, 7
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Agricultural Stabilization and Conservation Service	7, VII
Agriculture Department	
Agricultural Marketing Service	7, I, IX, X, XI
Agricultural Research Service	7, V
Agricultural Stabilization and Conservation Service	7, VII
Animal and Plant Health Inspection Service	7, III; 9, I, III
Commodity Credit Corporation	7, XIV
Contract Appeals, Board of	7, XXIV
Energy, Office of	7, XXIX
Environmental Quality, Office of	7, XXXI
Farmers Home Administration	7, XVIII
Federal Crop Insurance Corporation	7, IV
Federal Grain Inspection Service	7, VIII
Federal Procurement Regulations System	41, 4
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Foreign Economic Development Service	7, XXI
Forest Service	36, II
General Sales Manager, Office of	7, XXV
Inspector General, Office of	7, XXVI
Operations and Finance, Office of	7, XXX
Packers and Stockyards Administration	9, II
Rural Electrification Administration	7, XVII
Rural Telephone Bank	7, XVI
Secretary of Agriculture, Office of	7, Subtitle A
Soil Conservation Service	7, VI
Air Force Department	32, VII
Alaska Natural Gas Transportation System, Office of the Federal Inspector	10, XV
Alcohol, Tobacco and Firearms, Bureau of	27, I
AMTRAK	49, VII
American Battle Monuments Commission	36, IV
Animal and Plant Health Inspection Service	7, III; 9, I
Appalachian Regional Commission	5, IX
Architectural and Transportation Barriers Compliance Board	36, XI
Arms Control and Disarmament Agency, U.S.	22, VI; 41, 23
Army Department	32, V
Engineers, Corps of	33, II; 36, III
Benefits Review Board	20, VII

Agency	CFR Title, Subtitle or Chapter
Bilingual Education and Minority Languages Affairs, Office of	34, V
Blind and Other Severely Handicapped, Committee for Purchase from	41, 51
Board for International Broadcasting	22, XIII
Budget, Office of Management and	5, III
Census Bureau	15, I
Central Intelligence Agency	32, XIX
Child Support Enforcement, Office of	45, III
Chrysler Corporation Loan Guarantee Board	13, IV
Civil Aeronautics Board	14, II
Civil Rights Commission	45, VII
Civil Rights, Office for (Education Department)	34, I
Claims Collection Standards, Federal	4, II
Coast Guard	33, I; 46, I, III; 49, IV
Commerce Department	
Census Bureau	15, I
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Endangered Species Committee	50, IV
Federal Procurement Regulations System	41, 13
Fishery Conservation and Management	50, VI
Industrial Economics, Bureau of	15, VI
International Trade Administration	15, III; 19, III
National Bureau of Standards	15, II
National Defense	44, IV
National Marine Fisheries Service	50, II, IV
National Oceanic and Atmospheric Administration	15, IX; 50, II, IV
National Telecommunications and Information Administration	15, XXIII
Patent and Trademark Office	37, I
Secretary of Commerce, Office of	15, Subtitle A
United States Travel Service	15, XII
Commission on the Review of the National Policy Toward Gambling	1, IV
Committee for Purchase from Blind and Other Severely Handicapped	41, 51
Commodity Credit Corporation	7, XIV
Commodity Futures Trading Commission	17, I
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Community Services Administration	41, 22; 45, X
Comptroller of the Currency	12, I
Construction Industry Collective Bargaining Commission	29, IX
Consumer Product Safety Commission	16, II
Contract Appeals, Board of	7, XXIV
Copyright Office	37, II
Copyright Royalty Tribunal	37, III
Council on Environmental Quality	40, V
Customs Service, United States	19, I
Defense Department	32, Subtitle A
Air Force Department	32, VII
Army Department	32, V; 33, II; 36, III
Defense Civil Preparedness Agency	32, XVIII
Engineers, Corps of	33, II; 36, III
Navy Department	32, VI
Secretary of Defense, Office of	32, I
Defense Logistics Agency	32, XII
Defense Manpower Commission	1, IV
Delaware River Basin Commission	18, III
Depository Institutions Deregulation Committee	12, XII
Drug Enforcement Administration	21, II
East-West Foreign Trade Board	15, XIII
Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
Education, Department of	

Agency	CFR Title, Subtitle or Chapter
Bilingual Education and Minority Languages Affairs, Office of	34, V
Civil Rights, Office for	34, I
Education for Overseas Dependents, Office of	34, VIII
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
Federal Procurement Regulations System	41, 34
Postsecondary Education, Office of	34, VI
Secretary of Education, Office of	34, Subtitle A
Special Education and Rehabilitative Services, Office of	34, III
Vocational and Adult Education, Office of	34, IV
Education for Overseas Dependents, Office of	34, VIII
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
Employee Benefits Security, Office of	29, XXV
Employee-Management Relations Commission	22, VIII
Employees' Compensation Appeals Board	20, IV
Employees Loyalty Board, International Organizations	5, V
Employment and Training Administration	20, V
Employment Standards Administration	20, VI
Endangered Species Committee	50, IV
Energy, Department of	10, II, III, X; 41, 109
Federal Energy Regulatory Commission	18, I
Federal Procurement Regulations System	41, 9
Energy, Office of, Department of Agriculture	7, XXIX
Engineers, Corps of	33, II; 36, III
Engraving and Printing, Bureau of	31, VI
Environmental Protection Agency	40, I; 41, 15, 115
Environmental Quality, Office of (Agriculture Department)	7, XXXI
Equal Employment Opportunity	41, 60
Equal Employment Opportunity Commission	29, XIV
Equal Opportunity, Office of Assistant Secretary for	24, I
Executive Office of the President	3, I
Administration, Office of	5, XV
Export-Import Bank of the United States	12, IV
Family Assistance, Office of	45, II
Farm Credit Administration	12, VI
Farmers Home Administration	7, XVIII
Federal Aviation Administration	14, I
Federal Claims Collection Standards	4, II
Federal Communications Commission	47, I
Federal Contract Compliance, Office of	41, 60
Federal Crop Insurance Corporation	7, IV
Federal Deposit Insurance Corporation	12, III
Federal Election Commission	11, I
Federal Emergency Management Agency	41, 44; 44, I
Federal Energy Regulatory Commission	18, I
Federal Financial Institutions Examination Council	12, XI
Federal Financing Bank	12, VIII
Federal Grain Inspection Service	7, VIII
Federal Highway Administration	23, I, II; 49, III
Federal Home Loan Bank Board	12, V
Federal Inspector for the Alaska Natural Gas Transportation System, Office of	10, XV
Federal Labor Relations Authority, and General Counsel of the Federal Labor Relations Authority	5, XIV; 22,XIV
Federal Law Enforcement Training Center	31, VII
Federal Maritime Commission	46, IV
Federal Mediation and Conciliation Service	29, XII
Federal Mine Safety and Health Review Commission	29, XXVII
Federal Pay, Advisory Committee on	5, IV
Federal Prison Industries	28, III
Federal Procurement Regulations	41, I
Federal Procurement Regulations System	41, Subtitle A
Federal Property Management Regulations	41, 101

Agency	CFR Title, Subtitle or Chapter
Federal Property Management Regulations System	41, Subtitle C
Federal Railroad Administration	49, II
Federal Register, Administrative Committee of	1, I
Federal Register, Office of	1, II
Federal Reserve System	12, II
Federal Services Impasses Panel	5, XIV
Federal Trade Commission	16, I
Fine Arts Commission	36, X; 45, XXI
Fiscal Service	31, II
Fish and Wildlife Service, United States	50, I, IV
Fishery Conservation and Management	50, VI
Fishing and Whaling, International Regulatory Agencies	50, III
Food and Drug Administration	21, I
Food and Nutrition Service	7, II
Food Safety and Inspection Service	9, III
Foreign Agricultural Service	7, XV
Foreign Assets Control, Office of	31, V
Foreign Claims Settlement Commission of United States	45, V
Foreign Economic Development Service	7, XXI
Foreign Service Grievance Board	22, IX
Foreign Service Impasse Disputes Panel	22, XIV
Foreign Service Labor Relations Board	22, XIV
Foreign-Trade Zones Board	15, IV
Forest Service	36, II
General Accounting Office	4, I, II, III
General Sales Manager, Office of	7, XXV
General Services Administration	41, 5
Acquisition Policy, Office of	41, 5A, 5B
Federal Procurement Regulations System	41, 1, 5A, 5B
Federal Property Management Regulations System	41, 101, 105
Geological Survey	30, II
Government National Mortgage Association	24, III
Great Lakes Pilotage	46, III
Harry S Truman Scholarship Foundation	45, XVIII
Health and Human Services, Department of	45, Subtitle A
Child Support Enforcement, Office of	45, III
Family Assistance, Office of	45, II
Federal Procurement Regulations System	41, 3
Food and Drug Administration	21, I
Harry S Truman Scholarship Foundation	45, XVIII
Health Care Financing Administration	42, IV
Human Development Office	45, XIII
Public Health Service	42, I
Refugee Resettlement, Office of	45, IV
St. Elizabeths Hospital	42, III
Social Security Administration	20, III; 45, IV
Health Care Financing Administration	42, IV
Housing and Urban Development, Department of	
Community Planning and Development, Office of Assistant Secretary for	24, V, VI
Equal Opportunity, Office of Assistant Secretary for	24, I
Federal Procurement Regulations System	41, 24
Government National Mortgage Association	24, III
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, IX, XX
Housing Management, Office of Assistant Secretary for	24, IV
Low-Income Housing	24, VIII
Mortgage Insurance and Loan Programs Under Emergency Homeowners' Relief Act	24, XV
New Community Development Corporation	24, VII
Secretary, Office of	24, Subtitle A
Solar Energy and Energy Conservation Bank	24, X
Housing—Federal Housing Commissioner, Office of Assistant Secretary for	24, II, IX, XX
Housing Management, Office of Assistant Secretary for	24, IV
Human Development Services Office	45, XIII

Agency	CFR Title, Subtitle or Chapter
Immigration and Naturalization Service	8, I
Indian Affairs, Bureau of	25, I; 41, 14H
Indian Arts and Crafts Board	25, II
Industrial Economics, Bureau of, Commerce Department	15, VI
Information Agency, United States	22, V; 41, 19
Information Security Oversight Office	32, XX
Inspector General, Office of, Agriculture Department	7, XXVI
Inter-American Foundation	22, X
Intergovernmental Relations, Advisory Commission on	5, VII
Interior Department	
Endangered Species Committee	50, IV
Federal Procurement Regulations System	41, 14
Federal Property Management Regulations System	41, 114
Fish and Wildlife Service, United States	50, I, IV
Geological Survey	30, II
Indian Affairs, Bureau of	25, I; 41, 14H
Indian Arts and Crafts Board	25, II
Land Management Bureau	43, II
Mines, Bureau of	30, VI
National Park Service	36, I
Reclamation Bureau	43, I
Secretary of the Interior, Office of	43, Subtitle A
Surface Mining and Reclamation Appeals, Board of	30, III
Surface Mining Reclamation and Enforcement, Office of	30, VII
United States Fish and Wildlife Service	50, I, IV
Water Research and Technology, Office of	41, 14R
Water Resources Research, Office of	18, IV
Internal Revenue Service	26, I
International Boundary and Water Commission, United States and Mexico	22, XI
International Communication Agency	22, V; 41, 19
International Development, Agency for	22, II; 41, 7
International Development Cooperation Agency	22, II; 41, 7
International Joint Commission, United States and Canada	22, IV
International Organizations Employees Loyalty Board	5, V
International Regulatory Agencies (Fishing and Whaling)	50, III
International Trade Administration	15, III; 19, III
International Trade Commission, United States	19, II
Interstate Commerce Commission	49, X
Joint Board for the Enrollment of Actuaries	20, VIII
Justice Department	28, I; 41, 128
Drug Enforcement Administration	21, II
Federal Claims Collection Standards	4, II
Federal Prison Industries	28, III
Federal Procurement Regulations System	41, 28
Foreign Claims Settlement Commission of the United States	45, V
Immigration and Naturalization Service	8, I
Prisons, Bureau of	28, V
Labor Department	
Benefits Review Board	20, VII
Employees' Compensation Appeals Board	20, IV
Employment and Training Administration	20, V
Employment Standards Administration	20, VI
Federal Contract Compliance, Office of	41, 60
Federal Procurement Regulations System	41, 29, 50
Labor-Management Relations, Office of the Assistant Secretary	29, II
Labor-Management Standards Enforcement, Office of	29, IV
Mine Safety and Health Administration	30, I
Occupational Safety and Health Administration	29, XVII
Pension and Welfare Benefit Programs	29, XXV
Public Contracts	41, 50
Secretary of Labor, Office of	29, Subtitle A
Wage and Hour Division	29, V
Workers' Compensation Programs, Office of	20, I

Agency	CFR Title, Subtitle or Chapter
Labor-Management Relations, Office of Assistant Secretary	29, II
Labor-Management Standards Enforcement, Office of	29, IV
Land Management, Bureau of	43, II
Legal Services Corporation	45, XVI
Library of Congress	36, VII
Copyright Office	37, II
Low-Emission Vehicle Certification Board	40, IV
Low-Income Housing, Department of Housing and Urban Development	24, VIII
Management and Budget, Office of	5, III
Marine Mammal Commission	50, V
Maritime Administration	46, II
Merit Systems Protection Board	5, II
Micronesian Status Negotiations, Office for	32, XXVII
Mine Safety and Health Administration	30, I
Mines, Bureau of	30, VI
Miscellaneous Agencies	1, IV
Monetary Offices	31, I
Mortgage Insurance and Loan Programs Under the Emergency Homeowners' Relief Act, Department of Housing and Urban Development	24, XV
National Aeronautics and Space Administration	14, V; 41, 18
National Bureau of Standards	15, II
National Commission on Libraries and Information Science	45, XVII
National Commission on the Observance of International Women's Year	45, XIX
National Credit Union Administration	12, VII
National Foundation on the Arts and the Humanities	45, XI
National Highway Traffic Safety Administration	23, II; 49, V
National Labor Relations Board	29, I
National Marine Fisheries Service	50, II, IV
National Mediation Board	29, X
National Oceanic and Atmospheric Administration	15, IX; 50, II, VI
National Park Service	36, I
National Railroad Adjustment Board	
National Railroad Passenger Corporation (AMTRAK)	49, VII
National Science Foundation	45, VI; 41, 25
National Security Council	32, XXI
National Security Council and Office of Science and Technology Policy	47, II
National Telecommunications and Information Administration	15, XXIII
National Transportation Safety Board	49, VIII
Navajo and Hopi Indian Relocation Commission	25, IV
Navy Department	32, VI
Neighborhood Reinvestment Corporation	24, XXV
New Community Development Corporation	24, VII
Nuclear Regulatory Commission	10, I; 41, 20
Occupational Safety and Health Administration	29, XVII
Occupational Safety and Health Review Commission	29, XX
Overseas Private Investment Corporation	22, VII
Packers and Stockyards Administration	9, II
Panama Canal Regulations	35, I
Patent and Trademark Office	37, I
Peace Corps	22, III
Pennsylvania Avenue Development Corporation	36, IX
Pension Benefit Guaranty Corporation	29, XXVI
Pension and Welfare Benefit Programs, Department of Labor	29, XXV
Personnel Management, Office of	5, I; 41, 16; 45, VIII
Postal Rate Commission	39, III
Postal Service, United States	39, I
Postsecondary Education, Office of	34, VI
President's Commission on White House Fellowships	1, IV
Presidential Documents	3
Prisons, Bureau of	28, V

Agency	CFR Title, Subtitle or Chapter
Privacy Protection Study Commission	1, IV
Procurement Regulations System, Federal	41, Subtitle A
Property Management Regulations System, Federal	41, Subtitle C
Public Contracts, Department of Labor	41, 50
Public Health Service	42, I
Railroad Retirement Board	20, II
Railway Association, United States	49, IX
Reclamation Bureau	43, I
Refugee Resettlement, Office of	45, IV
Regional Action Planning Commissions	13, V
Research and Special Programs Administration	49, I
Rural Electrification Administration	7, XVII
Rural Telephone Bank	7, XVI
Saint Elizabeths Hospital	42, III
Saint Lawrence Seaway Development Corporation	33, IV
Science and Technology Policy, Office of	32, XXIV
Science and Technology Policy, Office of, and National Security Council	47, II
Secret Service	31, IV
Securities and Exchange Commission	17, II
Selective Service System	32, XVI
Small Business Administration	13, I
Smithsonian Institution	36, V
Social Security Administration	20, III; 45, IV
Soil Conservation Service	7, VI
Solar Energy and Energy Conservation Bank, Department of HUD	24, X
Soldiers' and Airmen's Home, United States	5, XI
Special Education and Rehabilitative Services, Office of	34, III
Special Representative for Trade Negotiations, Office of	15, XX
State Department	22, I
Federal Procurement Regulations System	41, 6
Surface Mining and Reclamation Appeals, Board of	30,III
Susquehanna River Basin Commission	18, VIII
Tennessee Valley Authority	18, XIII
Trade Representative, United States, Office of	15, XX
Transportation, Department of	
Coast Guard	33, I; 46, I, III; 49, IV
Federal Aviation Administration	14, I
Federal Highway Administration	23, I, II; 49, III
Federal Procurement Regulations System	41, 12
Federal Railroad Administration	49, II
Highway Safety Program Standards	23, II
Maritime Administration	46, II
National Defense	44, IV
National Highway Traffic Safety Administration	23, II; 49, V
Research and Science Programs Administration	49, I
Saint Lawrence Seaway Development Corporation	33, IV
Secretary, Office of	49, Subtitle A
Urban Mass Transportation Administration	49, VI
Travel Service, United States	15, XII
Treasury Department	
Alcohol, Tobacco and Firearms, Bureau of	27, I
Comptroller of the Currency	12, I
Customs Service, United States	19, I
Engraving and Printing, Bureau of	31, VI
Federal Law Enforcement Training Center	31, VII
Federal Procurement Regulations System	41, 10
Fiscal Service	31, II
Foreign Assets Control, Office of	31, V
Internal Revenue Service	26, I
Monetary Offices	31, I
Secret Service	31, IV
Secretary of the Treasury, Office of	31, Subtitle A
Truman, Harry S, Scholarship Foundation	45, XVIII
United States and Canada, International Joint Commission	22, IV

Agency	CFR Title, Subtitle or Chapter
United States Arms Control and Disarmament Agency	22, VI; 41, 23
United States Customs Service	19, I
United States Fish and Wildlife Service	50, I, IV
United States International Development Cooperation Agency	22, XII
United States International Trade Commission	19, II
United States Metric Board	15, V
United States Postal Service	39, I
United States Railway Association	49, IX
United States Soldiers' and Airmen's Home	5, XI
United States Trade Representative, Office of	15, XX
United States Travel Service	15, XII
Urban Mass Transportation Administration	49, VI
Veterans Administration	38, I; 41, 8
Vice President of the United States, Office of	32, XXVIII
Vocational and Adult Education, Office of	34, IV
Wage and Hour Division	29, V
Water Research and Technology, Office of	41, 14R
Water Resources Council	18, VI
Water Resources Research, Office of	18, IV
Welfare-Pension Reports, Office of Labor-Management and	29, IV
Workers' Compensation Programs, Office of	20, I

Redesignation Tables

The regulations in Chapter XIII (Bureau of Labor Standards) were transferred to Chapter XVII (Occupational Safety and Health Administration) and redesignated as follows at 36 FR 25232, Dec. 30, 1971:

Former Part No.	New Part No.
1501	1915
1502	1916
1503	1917
1504	1918
1505	1919
1506	[Removed]
1507	1920
1508	1921
1509	1922
1510	1923
1515	1924
1516	1925
1518	1926
1520	Title 20, Pt. 101*

Noted at 37 FR 1172, Jan. 26, 1972.

Chapter XVI was established at 33 FR 20049, Dec. 31, 1968, to include the material formerly in Title 48, Chapter V, as follows:

Title 48 Former Part No.	New Part No.
501	1601

The following table shows the structure of Chapter XIII following redesignations occurring at 28 FR 1634, Feb 21, 1963, and at 28 FR 7909, Aug. 2, 1963:

Former Part No.	New Part No.
4	1500
8	1501
8a	1502
9	1504
10	1506
11	1507
12	1508
13	1509

BEST DOCUMENT AVAILABLE

BLANK PAGE

BLANK PAGE

List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations which were made by documents published in the Federal Register since January 1, 1973, are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters and parts as well as sections for revisions.

For the period before January 1, 1973, see the "List of CFR Sections Affected, 1949-1963 and 1964-1972," published in three separate volumes.

1973

29 CFR	38 FR Page
Chapter V	
511.4 Revised	6278
516.3 Revised	7115
541 Revised	11390
602.2 (a)(2)(i), (3)(i), and (5)(i) revised	17123
603.2 (a)(1)(i), (2)(i), (3)(i), and (4)(i), (b)(1)(i), and (c)(1)(i) revised	17213
615.2 (a)(1), (3), (b)(1), (c)(1) amended	17213
687.2 (a)(1)(i) and (2)(i) and (c)(i) revised	17214
779.372 (c)(3) revised	7549

1973–1974

(Regulations published from July 1, 1973 through June 30, 1974)

29 CFR	38 (39*) FR Page
Chapter V	
511.4 Revised	*1266
511.8 (b) revised	*17947
511.10 Revised	*17948
511.13 Revised	*17948
516.33 (a) and introductory text of (b) revised; (g) added	27520
519 Revised	*15117
519.6 (39 FR 15117) Compliance date extended through 8-31-74	*23995

29 CFR—Continued	38 (39*) FR Page
Chapter V—Continued	
519.16 (39 FR 15117) Compliance date extended through 8-31-74	*23995
520.12 Revised [1]	*3257
522.24 Revised	*15123
522.35 (a) revised	*15123
522.43 (a) and (d) revised	*15123
522.65 (a) revised	*15124
522.85 (a) revised	*15124
525 Revised	*17509
545.9 Revised	34805
545.13 Removed	34810
570.35a Revised	*3257
(b)(3)(ii) corrected	*3822, 4478
601.1 Revised	*13271
608.2 (a), (b), and (c) revised	23402
609.2 (a)(1) and (2) revised	23403
610.2 (a) revised	25988
612.1 Revised	25989
612.2 Revised	25989
614.2 (a)(1) and (c)(1) revised	25989
690 Revised	*13271
694.1 (b)(2)(i) and (4)(i) revised	*6607
697.1 (a)(1), (b), (c)(1), (d)(1), (e), (f), (g), (h)(1), (i), (j), (k)(1), and (l)(1) revised	32576
697.3 Revised	32576
720.1 Revised	*13271
720.2 (a)(4) removed	*13271
720.3 Revised	*13271
723.2 (b)(1) revised	26718
724.2 (b)(1) and (c) revised	35305
725.2 Revised	35305
730 Added	*13271
780.305 (c) added	27520
780.308 Revised	17726
780.331 (d) revised	27521

---

[1] Provisions to expire June 30, 1975.

NOTE: Symbol (*) identifies changes published in 1974.

29 CFR—Continued

Chapter V—Continued	38 (39*) FR Page
870.10 (b) revised	*15032

1974–1975

(Regulations published from July 1, 1974 through June 30, 1975)

29 CFR

Chapter V	39 (40†) FR Page
511.4 Revised	† 7091
511.8 (b) corrected	33797
512 Removed	†4
516.34 Added	†7405
519 Revised	†6329
519.1 (a) corrected	†22546
519.5 (b) corrected	†22546
519.6 (e), (f), (g), (h), and (j) corrected	†22546
519.7 (b)(3) corrected	†22546
519.9 (a) corrected	†22546
519.11 (a) corrected	†22546
519.12 (a) corrected	†22546
519.13 (a) corrected	†22546
519.16 (e) corrected	†22546
519.17 (b)(1) and (o) corrected	†22546
519.19 (a) corrected	†22546
522.24 Revised	29180
(c) corrected	41841
522.35 (a) revised	29180
522.43 (a) and (d) revised	29180
(a)(6) and (7) corrected	41841
522.65 (a) revised	29180
522.85 (a) revised	29180
529 Added	†5776
Time extended	†11872
541.1 (f) revised	†7092
541.2 (e) revised	†7092
541.3 (e) revised	†7092
541.52 Added	†7092
541.117 (a) and (b) revised	†7092
541.118 (b) revised	†7092
541.119 Revised	†7093
541.211 (a) and (b) revised	†7093
541.214 Revised	†7093
541.311 (a) and (b) revised	†7093
541.313 (c) and (d) revised	†7093
541.315 Revised	†7093
541.601 Revised	†7094

NOTE: Asterisk (*) identifies changes published in 1974.

NOTE: Symbol (†) refers to 1975 page numbers.

29 CFR—Continued

Chapter V—Continued	39 (40†) FR Page
545.9 Revised	†12069, 22830
552 Added	†7405
553 Added	44142
579 Added	†25792
580 Added	†25795
580.18 (b)(3) revised	†27218
613.1 Revised	43537
613.2 Revised	43537
617 Added	43538
657 Heading revised	43539
657.2 (a)(1)(i), (2)(i), (3)(i), (4)(i), and (5), (b)(1) and (c)(1) revised	43539
657.3 Revised	43539
661.2 (a) and (b) revised	43540
670.1 Revised	†16063
Effective date added	†17146
670.2 Revised	†16063
Effective date added	†17146
671.2 (a), (b), and (c) revised	43542
672 Heading revised	43542
672.1 Revised	43542
672.2 Revised	43542
673 Heading revised	42354
673.1 Revised	42354
673.2 Revised	42354
675 Heading revised	43540
675.1 Revised	43540
675.2 (a) and (b) revised	43540
675.3 Revised	43540
677.2 (a) and (b) revised	43541
678 Heading revised	43541
678.1 Revised	43541
678.2 (a), (b), and (c) revised	43541
678.3 Revised	43541
683.2 (a) and (b) revised	43543
694.1 Revised	29353
Revised	†15875
(c)(4), (5), (6), and (7) added	†26031
694.2 Revised	29353
697.1 (k), (l), and (m) revised	37194
700 Added	28877
701 Added	32027
701.2 (e)(1) corrected	†11872
720 Heading revised	43543
720.1 Revised	43543
720.2 (a) and (b) revised	43544
726.2 Revised	†16063
Effective date added	†17146
727.1 Revised	31316
727.2 Revised	31316

1975–1976

(Regulations published from July 1, 1975 through June 30, 1976)

29 CFR

40 (41Δ) FR Page

Chapter V

511.4 Revised.................................55321
511.8 (b) revised..........................Δ26680
570.1—570.2 (Subpart A) Amended..................................Δ26834
570.5—570.27 (Subpart B) Amended..................................Δ26835
570.35a Revised..............................40801
(a), (b)(2), (b)(4)(i), and (c)(3) corrected..................................44130
579.2 Corrected.............................53237
579.3 (a)(3) and (4) removed.....Δ26836
602.1 Revised.................................58138
602.2 Revised.................................58138
603.2 Revised.................................58139
604.1 Revised.................................36564
604.2 Revised.................................36565
606.1 Revised.................................36565
606.2 Revised.................................36565
608.2 Revised.................................58139
609.2 Revised.................................58140
610.2 Revised.................................58140
611.2 Revised.................................58141
612.1 Revised.................................58141
612.2 Revised.................................58141
614.2 Revised.................................58142
615.1 Revised.................................58142
615.2 Revised.................................58142
687.1 Revised.................................58143
687.2 Revised.................................58143
697 Revised..................................Δ24121
723.2 Revised...............................Δ16956
724.2 Revised...............................Δ16957
725.2 Revised...............................Δ16957
727.2a Removed...........................28064
727.3 Corrected...........................28064
870.10 (b), (c), and (d) revised; (e) and (f) removed..................52610

1976–1977

(Regulations published from July 1, 1976, through June 30, 1977)

29 CFR

41 (42*) FR Page

Chapter V

511.4 Revised.................................*2313
524.1 Amended.............................29378
524.12 Amended...........................29378

Note: Symbol (Δ) refers to 1976 page numbers.

Note: Symbol (*) refers to 1977 page numbers.

29 CFR—Continued

41 (42*) FR Page

Chapter V—Continued

609.2 (a) revised............................*2955
613.1 Revised.................................*3303
613.2 (a)(1)(v)(A), (vi)(A), and (2)(i) revised..............................*3303
657.2 (a)(1), (2), (3), and (5) revised...*4440
672.2 (a)(1) revised........................*2955
673.1 Revised.................................*2955
673.2 (a)(5)(i), (6)(i), (7)(i), (8)(i), and (b) (5)(i) and (6)(i) revised..*2955
675.1 (b) revised..........................*18065
675.2 (a)(1) and (b)(1) revised; (c), (d), and (e) removed.........*18065
678.2 Introductory text added; (a)(1) and (2) introductory texts revised; (d) removed......*18065
694.1 (a)(1), (2)(i), (3)(i), (b)(1)(i), (2)(i), (3)(i), (4)(i), (5)(i), (c)(1)(i), (2)(i), and (3)(i) revised.............................*18589
699 Revised...................................34744
700.2 (a)(1), (b)(1), (c)(1), (d)(1)(i)(A)(*1*) and (B)(*1*), (d)(1)(ii)(A), (iii)(A), (iv)(A), (2)(i)(A) and (2)(ii)(A) revised...44695
701.2 (a)(1), (c)(1), (d), (e), (f)(1) and (g)(1) revised......................43403
720.1 Revised.................................*3304
720.2 (a)(1)(i), (2)(i), (3)(i), (4)(i), (b)(1)(i), and (2)(i) revised; (c) removed.....................*3304
721.1 Revised.................................38504
721.2 (a) and (b)(1) revised..........38504
727.2 Revised.................................43403
775.2 Added..................................*32254
775.3 Added..................................*32254

1977–1978

(Regulations published from July 1, 1977 through June 30, 1978)

29 CFR

42 (43†) FR Page

Chapter V

511.4 Revised.................................65164
519.2 (f) revised............................58745
519.4 (a) revised............................58745
519.5 (b) revised............................58745
519.6 (c), (d), and (i) revised........58745
520 Special authority...................64344
521.3 (b) revised..........................†12311

Note: Symbol (†) refers to 1978 page numbers.

29 CFR—Continued

42 (43†) FR Page

Chapter V—Continued

521.4 (c) revised.......................... †12311
522.24 (a) through (d) revised..... †5816
522.35 Heading and (a) revised... †5817
522.43 Heading and (a)(1) through (9) and (d) revised..... †5817
522.65 Heading and (a) revised... †5818
522.85 Heading and (a) revised... †5818
525.2 (c) revised............................ †5819
528.2 Revised.............................. †28469
528.3 Revised.............................. †28469
528.4 Revised.............................. †28469
528.5 Revised.............................. †28469
528.7 Revised.............................. †28469
530.2 Revised.............................. †28470
530.4 (a) introductory text and (1)(ii) revised.......................... †28470
530.10 Revised............................ †28470
530.12 (b)(1), (2) and introductory text and undesignated paragraph of (3) revised........ †28470
530.13 Revised............................ †28470
575 Added.................................. †26562
Republished.............................. †27469
575.2 Corrected........................... †28471
575.5 (d) corrected...................... †28471
575.8 (j) corrected....................... †28471
602.2 (a)(1)(i), (2)(i), and (3) and (b)(1) and (c)(1) revised; (a)(4) removed; (a)(5) redesignated as (a)(4) and new (a)(1)(i) revised......................... 57687
603.2 (a)(1)(i) and (2)(i), (b)(1), and (c)(1) revised...................... 57688
615.2 (a)(3) redesignated as (a)(4) and revised; new (a)(3) added; (a)(1)(i), (2)(i), and (4)(i), (b)(1), (c)(1)(i) and (2)(i) revised.......................... 57689
697.1 (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1), (h)(1), (i)(1), (j)(1), (k)(1), (l)(1), (m)(1), and (n)(1) and (a) through (n) headings revised.. †25816
(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1), (h)(1), (i)(1), (j)(1), (k)(1), (l)(1), (m)(1), (n)(1) and (a) through (n) headings revised, republished....................................... †26003
697.3 Revised............................. †25817
Republished................................ 26004

Note: Symbol (†) refers to 1978 page numbers.

29 CFR—Continued

42 (43†) FR Page

Chapter V—Continued

870.10 (b)(1) through (3), (c) introductory text and (d) revised; (c)(3) through (5) added....................................... †28471
870.57 (a) removed; (b) redesignated as (a) and revised......... †28472

1978–1979

(Regulations published from July 1, 1978 through June 30, 1979)

29 CFR

43 (44Δ) FR Page

Chapter V

519.2 (f) corrected......................... 29000
552.2 (b) revised................ Δ6715, 37221
552.100 (a)(1) revised.................. Δ6716
575.5 (d) revised............................ 36623
(d)(3) table corrected.................. 37181
(d) and (g) revised Δ22060
(d) revised.................................. Δ24059
(d) (2) and (3) tables and (5)(i) list amended.......................... Δ28663
(d) (2) and (3) tables and (5)(i) list amended (republication)... Δ29049
786.50 (Subpart B) Removed.... Δ26871
860.120 Revised.......................... Δ30658
870.1 (a) revised......................... Δ30684
870.10 (b) introductory text and (c)(2) revised............................. 30276
Heading revised........................ Δ30685
870.11 Added.............................. Δ30685

1979–1980

(Regulations published from July 1, 1979 through June 30, 1980)

29 CFR

44 (45*) FR Page

Chapter V

511.4 Revised.................................. *6092
697.1 (a), (b), (c), (d), (e) (1), (f), (g) (1), (h) (1), (i) (1), (j) (1), (k) (1), (l), (m), and (n) revised.. *40601
(a) through (d), (e) (1), (f), (g) (1), (h) (1), (i) (1), (j) (1), (k) (1), (l), (m), and (n) revised....*40986
697.3 Revised...................*40602, 40987
775.2 Revised............................... 75629
775.3 Revised............................... 75630
775.4 Added................................. 75630

Note: Symbol (Δ) refers to 1979 page numbers.

Note: Symbol (*) refers to 1980 page numbers.

29 CFR—Continued

44 (45*) FR Page

Chapter V—Continued

850 Removed; regulations transferred to Part 1627 and revised 38459

1980–1981

(Regulations published from July 1, 1980 through June 30, 1981)

29 CFR

45 (46†) FR Page

Chapter V

526 Incorporation by reference approvals .... †33980
541.1 (f) revised .... †3013
(f) effective date deferred ... †11972, 12207
541.2 (e) revised .... †3013
(e) effective date deferred ... †11972, 12207
541.3 (e) revised .... †3014
(e) effective date deferred ... †11972, 12207
541.5a Revised .... †3014
Effective date deferred ... †11972, 12207
541.52 Removed .... †3014
Removal effective date deferred .... †11972, 12207
541.117 (a) and (b) revised .... †3014
(a) and (b) effective date deferred .... †11972, 12207
541.118 (b) revised .... †3014
(b) effective date deferred ... †11972, 12207
541.119 Revised .... †3014
Effective date deferred ... †11972, 12207
541.211 (a) and (b) revised .... †3014
(a) and (b) effective date deferred .... †11972, 12207
541.214 Revised .... †3015
Effective date deferred ... †11972, 12207
541.311 (a) and (b) revised .... †3015
(a) and (b) effective date deferred .... †11972, 12207
541.313 (c) and (d) revised .... †3015
(c) and (d) effective date deferred .... †11972, 12207
541.315 Revised .... †3015
Effective date deferred ... †11972, 12207
541.601 Revised .... †3016
Effective date deferred ... †11972, 12207

29 CFR—Continued

45 (46†) FR Page

Chapter V—Continued

570 Incorporation by reference approvals .... †33980
575.5 (d) revised .... †55177
778 Technical correction .... †32440
778.3 Revised .... †7309
778.101 Revised .... †7309
78.102 Revised .... †7309
778.107 Revised .... †7309
778.110 Revised .... †7309
778.111 Revised .... †7309
778.113 Revised .... †7310
778.114 (b) revised .... †7310
778.116 Revised .... †7310
778.120 (a) examples (i) and (ii) and (b) revised .... †7310
778.202 (c) and (e) revised .... †7311
778.205 Revised .... †7311
778.206 Revised .... †7311
778.215 (a)(4) revised .... †7312
778.219 (a) (1) and (2) and (b) (1) and (2) revised .... †7312
778.220 Revised .... †7312
778.221 (b) revised .... †7313
778.223 Revised .... †7313
778.302 (b) revised .... †7314
778.304 (b) revised .... †7314
778.306 (a) revised .... †7314
778.307 Revised .... †7314
778.308 (b) revised .... †7314
778.310 Revised .... †7314
778.311 (b) revised .... †7315
778.313 Revised .... †7315
778.317 Revised .... †7315
778.320 Revised .... †7315
Technical correction .... †32440
778.322 Revised .... †7316
778.323 Revised .... †7316
Corrected .... †33516
778.325 Revised .... †7316
778.326 Revised .... †7316
778.327 Revised .... †7317
(b) corrected .... †33516
778.408 (c) revised .... †7317
778.409 Revised .... †7317
778.411 Revised .... †7317
778.413 Revised .... †7318
778.414 (b) revised .... †7318
778.501 Revised .... †7318
(a) corrected .... †33516
778.502 (b) and (c) revised .... †7318
778.503 Revised .... †7319

NOTE: Symbol (†) refers to 1981 page numbers.

29 CFR—Continued

45 (46†) FR Page

Chapter V—Continued

778.601 Heading, (a), (c), and (e) revised.......... †7319
(a) corrected.......... †33516
778.602 (a) and (b) revised.......... †7319
778.603 Removed.......... †7320

1981-1982

(Regulations published from July 1, 1981 through June 30, 1982)

29 CFR

46 (47Δ) FR Page

Chapter V

511.4 Revised.......... Δ11866
516.2—516.10 (Subpart A) Amended.......... 62845
Amended.......... Δ145

29 CFR—Continued

46 (47Δ) FR Page

Chapter V—Continued

516.11—516.34 (Subpart B) Amended.......... 62845
Amended.......... Δ145
530.1 (f) removed; (g) through (j) redesignated as (f) through (i).......... 50349
530.2 Revised.......... 50349
530.4 (a)(2)(i)(*f*) removed; (a)(2)(i)(*g*) redesignated as (a)(2)(i)(*f*).......... 50349
547.1 Amended.......... Δ145
549.1 Amended.......... Δ145
570.35 (b)(3)(vi) amended.......... Δ145
570.35a Correctly amended.......... Δ28095
575.3 Amended.......... 62845
Amended.......... Δ145
580 Authority citation.......... Δ24702
580.10 Amended.......... Δ24702
697 Authority citation.......... Δ26826
697.1 (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1), (h)(1), (i)(1), (j)(1), (k)(1), (l)(1), (m)(1), (n)(1) revised.......... Δ26826
697.3 Revised.......... Δ26827

NOTE: Symbol (†) refers to 1981 page numbers.

NOTE: Symbol (Δ) refers to 1982 page numbers.